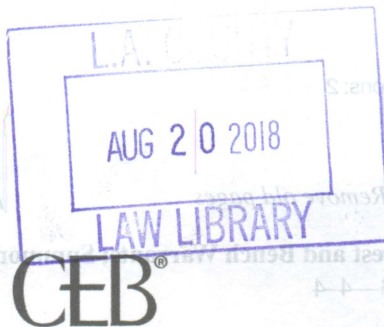


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UING EDUCATION OF THE BAR • CALIFORNIA

California Criminal Law Forms Manual

Second Edition

August 2018 Update

Filing Instructions

This packet contains replacement pages to be interleaved in the main text, including a complete replacement of chapters 6, 23, 35, 37, 52, and 57 and the “Tables” and “Index” sections at the end of the book. For a complete list of all pages that should be in your binder after inserting the revised pages, see the accompanying Page List.

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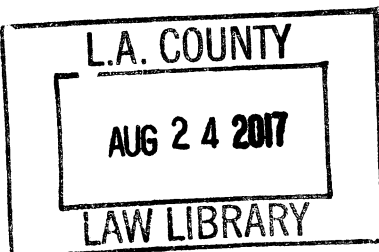
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CONTINUING EDUCATION OF THE BAR • CALIFORNIA

California Criminal Law Forms Manual

Second Edition

August 2017 Update

Filing Instructions

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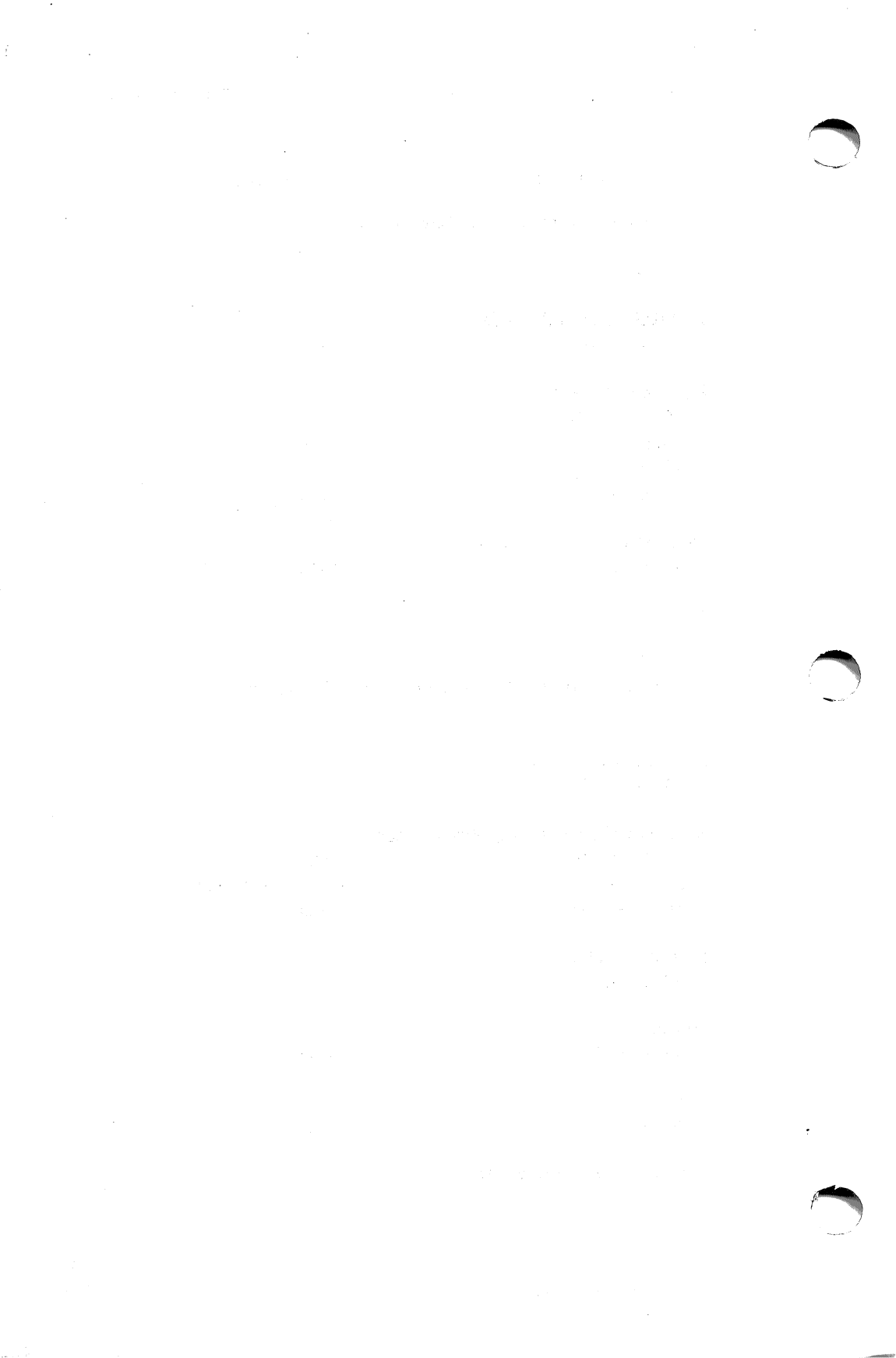
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Preface to the Second Edition

California Criminal Law Forms Manual was conceived as a companion to CEB's popular criminal law treatise, *California Criminal Law Procedure and Practice* (Cal CEB Annual) (Crim Law). Since its inception, the Forms Manual has mirrored Crim Law's organizational structure. The chapter numbers in the Forms Manual are the same as the chapter numbers in Crim Law. Therefore, forms that relate to the subject matter of a particular chapter in Crim Law can be found in the chapter of the same number in the Forms Manual. In 2005, CEB changed the organizational structure of Crim Law. This restructuring made it appropriate to reorganize the Forms Manual, so that it would continue to mirror the structure of Crim Law.

We took this opportunity to make a number of other changes, including adopting a convenient compact format, consolidating instructions for drafting and filing motions in Chapter 1, and updating authorities and comments when appropriate. As in the first edition, the forms are cross-referenced to the appropriate chapters or sections of Crim Law. The book and disk have identical forms, with the exception of Judicial Council forms, which are found only in the book. See the discussion of Judicial Council forms in Chapter 1. Instructions for using the forms disk are enclosed with the disk.

Sara Ruddy, CEB Publications Attorney, served as project manager for the second edition. CEB attorneys Nancy Yuenger and Cathy Daly provided legal editing and research. Christopher Forshay handled copy editing and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

August 2018 Update

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Acknowledgments

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Selected Developments

August 2018 Update

The current update includes changes throughout this publication that reflect recent developments in case law, legislation, court rules, and jury instructions. Summarized below are some of the more important developments included in this update since publication of the 2017 update.

Release procedures. When the court is not permitted to deny bail, the court must release the defendant on his or her own recognizance, unless the court “finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and the community.” See *In re Humphrey* (review granted May 24, 2018, S247278; superseded opinion at 19 CA5th 1006) in chap 5.

Pretrial diversion. Effective January 1, 2018, Pen C §§1000–1000.65 no longer require a guilty plea and deferred entry of judgment. Deferred entry of judgment is still available in the limited context of “Back on Track” programs (Pen C §1000.8) and child abuse (Pen C §1000.12). Stats 2017, ch 778. See chap 27.

Juvenile delinquency proceedings. Revisions to Welf & I C §786 and newly enacted Welf & I C §786.5 provide that juveniles whose petitions were not sustained or who had their cases dismissed may have the arrest records sealed, although the prosecution retains the right to refile within 6 months for new evidence or witness availability. Stats 2017, ch 685. See chap 56.

strengthened bond

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of April 2018 and monitored developments through June 18, 2018.

CEB Citation

Cite this publication as California Criminal Law Forms Manual (2d ed Cal CEB).

Preparing and Filing Motions and Other Papers; Criminal Law Practice Management

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§1.1 I. OVERVIEW

Preparing and filing motions and other papers in court is a major part of any litigation practice. Criminal law is no exception. This manual contains examples and forms of motions and other papers that may be necessary or appropriate during the course of a case, accompanied when appropriate by sample memorandums in support of or in opposition to the motion or suggested arguments that can be adapted to particular fact situations. Each form is followed by a comment and a cross-reference to California Criminal Law Procedure and Practice (Cal CEB) (Crim Law). This manual has the same organizational structure as Crim Law. Thus, for example, because Crim Law, chap 11 is about discovery, forms related to discovery are in chap 11 of this forms manual.

Part II of this chapter, “Preparing, Filing, and Serving Motions and Other Papers,” covers the form and formatting of court papers (§§1.2–1.12), the use of Judicial Council forms (§1.13), local rules and forms (§§1.14–1.15), citation format (§1.16), service and filing requirements (§1.17), and general instructions for preparing effective motions (§§1.18–1.27). Part III, “Criminal Law Practice Management Forms” (§§1.28–1.31), contains forms that pertain to Crim Law, chap 1.

**II. PREPARING, FILING, AND SERVING
MOTIONS AND OTHER PAPERS****§1.2 A. Form and Format Requirements**

The form and format of papers filed in the trial court are governed by Cal Rules of Ct 1.2, 2.3, 2.100–2.119. “Papers” includes all documents offered for filing in any case, with the following exceptions (Cal Rules of Ct 2.3(2)):

- Exhibits or copies of exhibits;
- Judicial Council forms;
- Local court forms;

- Record on appeal in a limited civil case; and
- Briefs filed in appellate divisions.

The Rules of Court prescribe the form and format of papers filed in the trial court in detail, although papers “need not be in a tangible or physical form but may be in an electronic form.” Cal Rules of Ct 2.3(2). Compliance with their requirements is important because the clerk is not permitted to accept noncomplying papers without a court order. Cal Rules of Ct 2.118. But see Cal Rules of Ct 2.118(a) (clerk may not reject papers solely because they are handwritten or hand-printed, because handwritten or hand-printed papers are not in black or blue-black ink, or because the font size is not exactly as required (Cal Rules of Ct 2.104, 2.110(c)) on papers filed electronically in PDF format); Cal Rules of Ct 2.118(b) (clerk may not reject paper solely because it does not contain attorney’s or party’s fax number or e-mail address on first page).

§1.3 1. Paper and Font Requirements

All papers not filed electronically must be 8-1/2 × 11 inches in size, of standard quality, and at least 20-pound weight. Cal Rules of Ct 2.103. It must be white or unbleached with an opaque, unglazed finish. Cal Rules of Ct 2.103. All papers filed must be in font size not smaller than 12 points, and if not filed electronically must be typewritten, printed, or prepared by a duplication process that produces clear, legible, and permanent copies. Cal Rules of Ct 2.104. If papers are not filed electronically, only one side of the page may be used. Cal Rules of Ct 2.102.

All papers must be in a font style that is “essentially equivalent” to Courier, Times New Roman, or Arial. Cal Rules of Ct 2.105. The font size must be at least 12 points and the font color must be blue-black or black. Cal Rules of Ct 2.104, 2.106.

§1.4 2. Margins, Line Spacing, and Line Numbering Requirements

The left margin must be at least one inch from the left edge and the right margin at least 1/2 inch from the right edge. Cal Rules of Ct 2.107.

The lines on each page must be one and one-half spaced or double spaced and numbered consecutively. Cal Rules of Ct 2.108(1). Line numbers must be placed at the left margin and separated from the text by a vertical column of space at least 1/5 inch wide or a single or double vertical

line. Each line number must be aligned with a line of type or the line numbers must be evenly spaced vertically on the page. Line numbers must be consecutively numbered beginning with the number 1 on each page. There must be at least three line numbers for every vertical inch on the page. Cal Rules of Ct 2.108(4).

Footnotes, quotations, and printed forms of corporate surety bonds and undertakings may be single spaced and have unnumbered lines if they also comply generally with the space requirements of Rule 2.111. See Cal Rules of Ct 2.108(3), 2.111.

§1.5 3. Pages in General

The pages of any paper submitted to the court must be consecutively numbered, with the numbers at the bottom of the page, unless a rule provides otherwise for a particular type of document. Page numbering must begin with the first page and use only Arabic numbers; however, the page number may be suppressed and need not appear on the first page. Cal Rules of Ct 2.109.

All papers not filed electronically must be firmly bound at the top. Cal Rules of Ct 2.113. It is common to staple papers in the top-left corner. When filing in paper form, each page must have two prepunched holes at the top. The holes must be centered, 2-1/2 inches apart, and 5/8 of an inch from the top of the page. Cal Rules of Ct 2.115.

Exhibits submitted with papers not filed electronically may be attached to the papers, but they should be the same size as the rest of the papers. An exhibit that is larger or smaller than a standard 8-1/2 × 11 inch sheet of paper can be stapled to a blank sheet of letter-size paper. If the exhibit is a copy, it must be equal to computer-processed material in legibility and permanency. Cal Rules of Ct 2.114. Exhibits submitted with papers filed electronically must meet the requirements in Cal Rules of Ct 2.256(b). Cal Rules of Ct 2.114.

NOTE► A standard two-hole punch makes properly spaced holes.

Except for exhibits, each paper must have a footer at the bottom of each page, containing the title of the paper, or some clear and concise abbreviation, in at least 10-point font. The footer should be below the page number and divided from the rest of the page by a printed line. Cal Rules of Ct 2.110.

§1.6 4. First-Page Format: Caption

The first page of each paper must contain a caption consisting of the following (Cal Rules of Ct 2.111):

- The name, address, telephone number, fax number, e-mail address, and State Bar number of the attorney for the party on whose behalf the paper is being filed;
- The title of the court;
- The title and number of the case;
- The nature of the paper being filed; and
- The name of the judge and department to which the case is assigned.

A sample first page, including caption, is reproduced in §1.12.

NOTE► Providing a fax number or e-mail address, or both, does not constitute consent to service by fax or e-mail. Cal Rules of Ct 2.111(1).

§1.7 a. Attorney Identifying Information

The attorney's name, address, telephone number, fax number, e-mail address, and State Bar number must appear on the first page of any court paper. This information must begin on line 1, in the space commencing one inch from the top of the page, on the left-hand side of the page. Cal Rules of Ct 2.111(1).

The space on lines 1–7 to the right of the attorney's identifying information should be left blank. Cal Rules of Ct 2.111(2).

§1.8 b. Name of Court

The name or title of the court goes on line 8 or must be at least 3-1/3 inches from the top of the page. Cal Rules of Ct 2.111(3). The court's name is customarily centered and written in capital letters. There is no standard "proper" way to designate the name of the court. For example, in San Francisco, many attorneys refer to the court as the "Superior Court for the City and County of San Francisco," while others simply call it the "San Francisco County Superior Court." Both are proper.

§1.9 c. Title of Case; Description of Paper

The title of the case must be placed on the left side of the page below the title of the court. The initial pleading must list the name of every party to

the case, each on a separate line. Subsequent papers may list just the name of the first party on each side “with appropriate indication of other parties,” *e.g.*, “*et al.*” Cal Rules of Ct 2.111(4).

The case number should be placed to the right of and opposite the title of the case. Cal Rules of Ct 2.111(5). A description of the paper, *e.g.*, “Notice of Motion and Motion for Pretrial Discovery Compliance Order (Pen. Code, §1054.5),” goes below the case number. Cal Rules of Ct 2.111(6). A petition should identify the character of the action, *e.g.*, “Petition for Writ of Prohibition.” See sample caption in §1.12.

Court papers often have several distinct parts. A motion, for example, may include a notice of motion, the motion itself (which is often merged with the notice of motion), a supporting memorandum, one or more declarations in support of the motion, one or more exhibits, and a proposed order. When all the motion papers are being filed together, there is no requirement for each part to be captioned separately. Many attorneys do, however, include a separate caption for each part. If each part of a motion will not have a separate caption, it is a good idea to list all the parts in the caption on the first page, *e.g.*, “Notice of Motion and Motion to Suppress Evidence (Pen. Code, §1538.5), Declaration of Counsel, Supporting Memorandum, Proposed Order.”

A responsive paper should identify what is being responded to and, if there are multiple parties, should identify the party that filed the document that it is responding to, *e.g.*, “People’s Opposition to Defendant John Smith’s Motion to Suppress Evidence.”

§1.10 d. Name of Judge and Department

The name of the judge and department to which the case is assigned must appear below the nature of the paper or the character of the action or proceeding. Cal Rules of Ct 2.111(7).

§1.11 e. Other Information

When filing motion papers, it is common practice to put the date, time, and location (if known) of the hearing on the motion; the trial date, if one has been set; and whether the defendant is in custody below the title of the motion. Check local rules for requirements with regard to additional information that must be included on the first page of the notice of motion, such as the length of time required to hear the motion, whether the defendant is in or out of custody, and the department, hearing date, and hearing time.

§1.12

f. Sample Pleading: First Page

1 [Name] _____
 2 District Attorney, _____ County
 3 [Name] _____, Deputy District Attorney
 4 SBN 150,000
 5 1234 Main Street, Suite 101
 6 _____, California
 7 Tel: (123) 444-4444
 8 Fax: (123) 444-4445
 9 Email: deputyda@county.gov

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 12 COUNTY OF _____

13 Fax number and email address
 14 required

15 People of the State of California,) No. _____
 16 Plaintiff,)
 17 vs.) Notice of Motion and Motion to Increase Bail,
 18 John Smith,) Memorandum of Points and Authorities,
 19 Defendant) Declaration of Counsel
 20 Department _____
 21 Judge: Hon. [Name] _____

22 TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:
 23 PLEASE TAKE NOTICE that, on [date]_, at [time]_, in Department 10 of the
 24 above-entitled court, or as soon thereafter as the matter may come before the
 25 Court for an order increasing the bail from the present amount of \$100,000.
 26 This motion will be based on the attached memorandum of points and authorities,
 27 attached declaration of counsel for the People, the attached police report, dated _____,
 28 [list any other attached documents] all court documents in this case, and evidence and
 argument presented at the hearing on this motion.

Each page must have a footer, consisting of the name of the paper or a clear and concise abbreviation

1
 Motion to Increase Bail

Name of court must be on line 8

It is common practice to include additional information here, such as date, time, and location of the hearing on a motion; the trial date, if one has been set; and whether the defendant is in custody

§1.13

B. Judicial Council Forms

The California Judicial Council has drafted preprinted forms for many commonly used court papers. Some are mandatory; others are optional.

See Cal Rules of Ct 1.31, 1.35. Each form has an annotation in the lower left margin indicating whether its use is mandatory or optional and showing its effective date. Judicial Council forms must be accepted for filing by all the courts. Cal Rules of Ct 1.31(a), (c), 1.35(a), (c).

Judicial Council forms are available on the Judicial Branch website at <http://www.courts.ca.gov/forms.htm>. They all can be downloaded, and many can be filled in online. The filled-in forms can be saved. Judicial Council forms are also available from most court clerk offices.

Multiple-page forms may be either one-sided or two-sided; if both sides of the paper are used, the back of each page should be inverted so that it can be easily read in a file with the pages fastened together at the top. See Cal Rules of Ct 2.134(b).

It is acceptable to file computer-generated duplicates of Judicial Council forms. A printer with a resolution of at least 300 dots per inch must be used to print such forms. Cal Rules of Ct 1.44.

Forms not filed electronically must be firmly bound at the top and must have two pre-punched normal-sized holes, centered 2-1/2 inches apart and 5/8 of an inch from the top of the form. Cal Rules of Ct 2.133, 2.134(c).

Judicial Council Forms usually include a proof of service. This is, however, intended solely for the convenience of the parties. Use of the proof of service included with the form is optional; any proper proof of service is acceptable. Cal Rules of Ct 1.41.

C. Local Rules and Forms

§1.14 1. Local Rules

It is important to be aware of any local rules and to follow them. However, if the local rule conflicts with a statute or with a California Rule of Court, the local rule is of no effect. See Govt C §68070; *Cox v Superior Court* (1993) 19 CA4th 1046. Note, though, that if the local rule merely implements or reasonably extends the statute or rule of court, the local rule must be followed. See 2 Witkin, California Procedure, *Court* §§181, 199–200, 203, 205, 207 (5th ed 2008).

Each superior court must maintain a complete and up-to-date copy of its local rules in the office of the court's executive officer, in a county law library, or on the Internet. It must provide the Judicial Council with the street address and room number of the place where the rules are kept. See Cal Rules of Ct 10.613(e). In addition, each court is required to make its local rules available for inspection and copying at each location in which the court accepts filings, and to provide information about how to obtain a

complete copy of the rules. Cal Rules of Ct 10.613(b). Most of California's 58 counties post their local rules on their websites, which can be accessed from the Judicial Branch website at <http://courts.ca.gov/find-my-court.htm>. The rules are often in PDF format for convenient downloading. In addition, proposed local rules can often be viewed online.

Amendments to local rules must be filed with the Judicial Council in electronic form at least 45 days before their effective date. Cal Rules of Ct 10.613(d). Ordinarily, new and amended rules have an effective date of January 1 or July 1. See Govt C §68071. But see Cal Rules of Ct 10.613(i) (providing procedure for adopting rule with different effective date).

§1.15 2. Local Forms

Some counties have local forms that must be used in criminal cases. Check with the local clerk's office or local practitioners. Courts often post local forms on their websites. Superior court websites are listed on the Judicial Branch website at <http://courts.ca.gov/find-my-court.htm>.

§1.16 D. Citation Format

The Reporter of Decisions for the California Supreme Court writes the California Style Manual, which gives specific rules for citation of cases and statutes, and other grammatical issues. See Jessen, California Style Manual (4th ed 2000).

Lawyers in state courts usually follow some variation of the California Style Manual citation style for cases and statutes. Some local court rules require lawyers to follow some version of these style rules. Many lawyers, however, do not follow the complete style for citation of cases and statutes from the Style Manual. For example, the Style Manual requires three citations to be given for each case: the official citation found in the California Reports, the California Reporter citation, and the Pacific Reporter citation. It is common, however, for lawyers to give only the California Reports citation, or the California Reports and California Reporter citations.

The most commonly used citation forms for California cases from the California Style Manual follow:

- Cal., Cal.2d, Cal.3d, and Cal.4th (California Supreme Court cases).
- Cal.App., Cal.App.2d, Cal.App.3d, and Cal.App.4th (California Courts of Appeal cases).
- Cal.App.Supp., Cal.App.Supp.2d, Cal.App.Supp.3d, Cal.App.Supp.4th, and Cal.App.Supp.5th (California Superior Court Appellate Department cases).

Examples of complete cites using modified California Style Manual style follow:

- *People v. Jackson* (1993) 15 Cal.App.4th 1197.
- *Curry v. Superior Court* (1977) 75 Cal.App.3d 221.
- *In re Littlefield* (1993) 5 Cal.4th 122.

Later citations to cases replace the year with “supra,” and the page is denoted with the phrase “at p.” or “at pp.” When citing to the same case as before in the same paragraph, one can simply write “id. at p.” or “ibid.” if the reference is to the same page in the case.

California Style Manual style abbreviates code names for parenthetical citations to statutes, but does not use abbreviations for code names (or the section symbol) for textual references to statutory material. The word “subdivision” is written out in textual references and abbreviated “subd.” in parenthetical citations. Many superior court judges have a relaxed attitude toward the use of abbreviations in the text itself. Practice is more formal in the court of appeal and the supreme court. The most common California statutes cited in criminal cases are abbreviated in the California Style Manual as:

- Civ. Code
- Code Civ. Proc.
- Gov. Code
- Health & Saf. Code
- Pen. Code
- Veh. Code
- Welf. & Inst. Code

Samples of parenthetical code citations using California Style Manual style follow:

- Pen. Code, §484, subd. (a)
- Veh. Code, §10851

The word “subdivision” or the abbreviation “subd.” is not used for California Rules of Court or the United States Code. Examples of constitutional and Rules of Court citations using the California Style Manual style follow:

- U.S. Const.

- Cal. Const.
- Cal. Rules of Court

Examples of parenthetical constitutional and Rules of Court citations using the California Style Manual style follow:

- U.S. Const., 6th & 14th Amends.
- Cal. Const., art. I, § 15
- Cal. Rules of Court, rule 4.111(a)

§1.17 E. Service and Filing Requirements for Pretrial Motions

Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by a supporting memorandum, must be served and filed at least 10 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a). All papers opposing a pretrial motion must be served and filed at least 5 court days before the time appointed for hearing. Reply papers must be served and filed at least 2 court days before the time appointed for hearing. When serving by mail, attach a proof of service to the motion papers. In any event, proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a).

Pretrial motions may be filed with the criminal court clerk or with the clerk of the court where the motion will be heard, depending on local practice. Whether filing the papers with the court in person or by mail, counsel should include a copy to be conformed by the clerk and returned to counsel. A return stamped envelope should be enclosed if papers are mailed. The conformed copy is counsel's proof of the fact and date of filing of the motion.

NOTE► When serving a prosecutor or public defender in a large office by mail, put the deputy's name on the envelope to assist in its timely delivery.

Service should be made on each attorney of record and any unrepresented party. Service may be accomplished by:

- Mailing a copy of the motion under CCP §§1012–1013a;
- Serving the papers personally;
- Substituted service under CCP §1011; or

- Electronic service under CCP §1010.6 and applicable Rules of Court. CCP §1011(c).

For further discussion of serving papers, see *California Civil Procedure Before Trial*, chap 18 (4th ed Cal CEB).

F. Drafting Motions and Briefs

§1.18 1. Short Is Better Than Long

Trial and appellate judges must read many legal papers every day. Most judges like short motions and briefs that make their points in simple declarative sentences followed by citations of authority. Your important points may be lost in an unnecessarily long supporting or opposing memorandum, or the judge's eyes may have glazed over by the time he or she gets to your most important argument. On the other hand, it is often important to provide enough detail to persuade the judge that the facts of your case really do warrant granting the relief you are requesting.

§1.19 2. Simple Language Is Best

Short sentences written in clear language are easiest to read quickly. Try to avoid jargon and pretentious language. Use the active, rather than the passive, voice. Eliminate unnecessary words. Avoid string cites and unnecessarily long quotes.

There are a number of good books and articles on legal writing. See, *e.g.*, Wydick, *Plain English for Lawyers* (5th ed 2005).

§1.20 3. Be Clear

Make sure what you have written will be clear to the judge. When you complete a memorandum or a brief, reread it as if you were the judge. Start by reading the headings. Do they follow each other naturally? Do they make every point you want to make? Are any necessary steps missing? Then read the argument under each heading. Does it support the heading it is under, or should it go elsewhere? Do you need further support for the heading? Have you cited legal authority for each position?

§1.21 4. Be Persuasive

Your most important tool in persuading the judge to your position is to have found a statute or case that fits the facts of your case. Once located,

give the rule of law, apply it to the facts of your case, and draw a conclusion from that application. Be sure you Shepardize cases and statutes so that you do not use an overruled or depublished case, or a statute that has been amended or repealed.

Consider adding an introductory paragraph to the memorandum or brief that summarizes your main arguments. It helps to have an introductory paragraph that orients the judge right away to the main issues. This section could be called “Issues,” “Summary of Argument,” or some other suitable title. For example, in a Pen C §995 motion, this section might read: “John Doe is alleged to have killed the victim. The issue is whether he used a gun.” Proofreading can go a long way in making a brief appear more professional and persuasive.

§1.22 5. Tell the Judge What Relief You Want

“A motion is an application made to the court for an order.” *People v Carson* (1970) 4 CA3d 782, 785. Decide what order you want the judge to make and ask for it. For example, in a severance motion, which count or counts do you want severed? In a Pen C §1538.5 motion, what evidence do you want suppressed? Keep in mind that the request and order may end up being reviewed by an appellate court; appellate judges must be able to tell from the record what relief was requested and either granted or denied in the trial court. See *People v Superior Court (Pierson)* (1969) 274 CA2d 228, 232. (“A slipshod motion begot a slipshod ruling.... Maybe everybody knew what everybody was talking about but we do not.”)

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket of the car. I shivered slightly, but then I remembered that I was in the city, and the cold was just another part of the experience.

I walked towards the building, my feet crunching on the snow. The air was crisp and clear, and I could see the tops of the trees in the distance. I felt a sense of peace and tranquility, a feeling that I had never experienced before. It was as if the world had been reset, and I was starting a new chapter in my life.

Chapter 1: The First Steps

The first step was to find a place to stay. I had heard that the city was beautiful, but I didn't know where to go. I walked for hours, looking at the various buildings and streets. I finally found a small, cozy inn in the heart of the city. The innkeeper was a friendly old woman who showed me to my room. I was tired, but I felt a sense of accomplishment. I had found a place to stay, and I was ready to start my new life.

§1.23 6. Prepare Proposed Order

If you want the judge to issue a written order granting the motion, you will need to prepare a proposed order to accompany the motion. Although written orders are less common in criminal cases than in civil practice, you will need a written order if the order you want is a direction to someone not in court when the judge makes the order. In addition, you might want to prepare a proposed order if it is important to have the record reflect the exact nature of the relief requested or granted. Preparing a proposed order to go with the motion is a good way of focusing your attention on the need to decide what relief is desired, and allows the judge to give you exactly the relief you want.

Even if you do not include separate captions for other parts of the motion, a proposed order should always include a caption. A signed order is not part of the motion but a separate document. The court in which the case is being tried may have local rules or customs that relate to proposed orders. In Los Angeles, for example, a proposed order is always considered a separate document. It is not filed with the motion papers but “lodged” with the clerk until signed by the judge. See Los Angeles Ct R 8.6(b).

§1.24 7. Give the Judge Sufficient Information About the Case to Rule on Your Motion

Many lawyers assume that the judge knows everything about the case that they do. That is not true. Penal Code §1204.5 requires judges generally to refrain from looking at police and witness reports, the defendant’s arrest and conviction records, and any affidavits or representations concerning the case, whether written or oral, unless in support of a motion. Be sure to give the judge the information he or she needs to rule on your motion.

§1.25 8. Attach Declarations and Exhibits

Be sure to attach any record or declaration that is necessary to support your motion. Papers attached to a motion, *e.g.*, police reports or transcripts, must be labeled as exhibits. Typically, the defense labels its exhibits with capital letters and the prosecution uses numbers. When no local court rule or local practice dictates how exhibits are to be labeled, it is common either to center the title and number or letter at the very top or very bottom of the first page of the exhibit, *e.g.*, “EXHIBIT A” or

“EXHIBIT 1.” The pages of the exhibit are usually numbered at the bottom separately from the page numbers of the rest of the motion. Exhibits are commonly stapled together at the end of the motion, immediately in front of the proof of service.

§1.26 9. Find Out Where and When Particular Motions Are Heard Before Setting or Requesting a Date

It is common in many counties for particular motions, *e.g.*, Pen C §1538.5 motions, to be heard by one judge on a certain day of the week at a certain time. Find out this information so that you can calendar your motions for the right time and place.

§1.27 10. Serve Opposing Counsel and Attach Proof of Service

Trial judges will deny relief if your opponent was not served, except in the unusual situation in which you are allowed to bring an *ex parte* motion. The only way the judge knows if opposing counsel was served is by seeing a proof of service attached to your motion. Appellate clerks will probably refuse to accept your papers for filing if no proof of service is attached.

III. CRIMINAL LAW PRACTICE MANAGEMENT FORMS

§1.28 A. Client Information Letter

[Attorney's letterhead]

Date: _____

To: __ *[Name of client]* __

__ *[Address]* __

Re: *[Describe reason for letter, e.g., next court appearance; include case number if desired]*

Dear __ *[name of client]* __:

Your next court appearance is for __ *[tell purpose, e.g., the preliminary hearing]* __ **on** __ *[day of week]* __, __ *[date]* __, **at** __ *[time]* __, **in**

Department __[number]__ **of** __[name of court]__, **located at** __[address]__. **It is important that you be there on time.** __[A map is enclosed.]__ __[Please meet me outside the courtroom at __[time]__]__.

[You may want to tell the client what to wear to court, as well as what not to wear, as in the following example.]

Please wear a suit, pants with a shirt and jacket, or pants with a shirt to court. Please do not wear sunglasses, a baseball cap, shorts, or a tank top.

__[If the client failed to appear at the last court date, and it is possible the court will order the client into custody when he or she reappears, inform the client of that possibility so that he or she can make any necessary arrangements.]__

It is important that I have complete information about the witnesses in your case. Please call my office right away and give the office staff the names, phone numbers, addresses, or other identifying information concerning your witnesses, __[identify witnesses]__.

__[Remind the client if he or she is supposed to be having tests done, e.g., physical or psychological evaluations. Ask the client to call your office and leave the names, addresses, and phone numbers of experts if you do not have that information. If you need the results of these tests by a certain date, include that date in the letter.]__

Enclosed is a copy of the __[name of motion]__ **that has been filed with the court. If it is successful,** __[explain the result, e.g., one count will be dismissed, the case will be dismissed]__. __[If the client will have to testify at the hearing, tell the client that, and set up a meeting in advance of the hearing at which you can discuss the client's testimony with him or her.]__ **The court will hold a hearing on this motion at your next court appearance.**

Remember that you are not to discuss your case with anyone except me, my office staff, and those people I have directed to speak with you. If you have any questions concerning this, please call __[me/my office]__.

If you have any questions about your case __[tell the client how you want to be contacted, e.g., to call and talk with a particular staff member

who is familiar with the case, to ask you those questions when you meet at court, or to call your office and set up a phone conference time for you to return the client's call]_ _.

Very truly yours,

__[Signature of attorney]__

__[Typed name]_ _

Comment: It is important to keep in contact with clients. Not doing so is a frequent cause for complaints to the State Bar. You can keep clients satisfied and informed and get the information you need from them without having to talk to them each time if you set up office procedures that allow your staff to handle most calls.

It is a good idea to send a reminder letter before each court date. Writing the letter provides you with the opportunity to review the case file and ask the client for any information that is needed.

Cross-Reference: For discussion of the need to keep clients informed concerning their case, see California Criminal Law Procedure and Practice, chap 1 (Cal CEB).

§1.29 B. General Authorization

AUTHORIZATION FOR RELEASE OF INFORMATION

I, __[name of defendant]__, give my permission to my attorney, __[name]__, and __[his/her]__ agent to obtain any record of any nature that concerns me. This authorization extends from the date of this authorization to one year from that same date.

Date: _____

__[Signature of defendant]__

__[Typed name]_ _

__[Address]_ _

__[Telephone number]_ _

__[Date of birth]_ _

__[Social Security number]_ _

Cross-Reference: For discussion of public records, see California Criminal Law Procedure and Practice, chap 12 (Cal CEB).

§1.30

C. Release of Medical Records

RELEASE OF MEDICAL RECORDS

I hereby authorize and request __[doctor's or hospital's name]__ to disclose to my attorney, __[name of attorney]__, or __[his/her]__ representative, any and all information that you have concerning me. This includes, but is not limited to, __[describe the records you want, e.g., all records concerning my medical examination, diagnosis, and treatment by you and anyone at your direction]__. I also authorize and consent to the copying of any records whatsoever concerning the above. This information is necessary __[tell why, e.g., to assist me in defending myself in a criminal case]__. Its use will be limited to __[tell uses, e.g., the criminal case against me]__.

This authorization expires on __[date]__.

A photostatic copy or facsimile copy of this authorization shall be deemed to be valid as the original.

I have read and understand this authorization, and know that I have the right to receive a copy of the authorization.

Date: _____

__[Signature of client]__

__[Typed name]__

__[Address]__

__[Telephone number]__

__[Date of birth]__

Comment: Release of medical information is covered by CC §§56–56.37. The release must be in at least 14-point type, signed and dated by the patient. CC §56.11.

§1.31

D. Contract for Services of Consultant/Expert

[Attorney's letterhead]

Date: _____

To: __[Name of consultant]__

__[Address]__

RE: __[name of case/description of services]__

**CONFIDENTIAL—PRIVILEGED COMMUNICATION (Evid.
Code §952; Code Civ. Proc. §§2018.010–2018.080; Pen.
Code §1054.6)**

Dear __[name]__:

Thank you for agreeing to be a consultant on this case. This contract sets forth your and __[my/Law Firm's]__ obligations.

You have agreed to __[e.g., review specified material and consult with me following that review]___. __[If/Law Firm will]__ pay you \$___ per hour for your services __[up to a maximum of \$_____]___. __[A check in the amount of \$_____ is enclosed as a __[deposit/retainer]___.]__ You have also agreed to __[e.g., testify/write a report]__ if __[I request/Law Firm requests]__ you to __[testify/write a report]__ based on the review and consultation described above.

__[My/Law Firm's]__ obligation to you is to pay your fees, give you direction, and provide you with the information you need to provide your expert advice. Your duties include providing your expert advice to me in confidence.

The California Courts advise attorneys to inform their experts in writing about the nature of the confidentiality requirements of our relationship. What follows describes the fiduciary relationship established by this contract.

1. All information about this case, including any information we discussed before you agreed to consult on the case, is completely confidential. Unless you become a witness, all work you perform under this agreement comes within the attorney-client privilege and the attorney work product privilege. These privileges are statutory mandates under California Evidence Code section 952, Code of Civil Procedure sections 2018.010–2018.080, and Penal Code section 1054.6, which state that your work for __[me/us]__ is private and confidential, and that it cannot be discovered by anyone. These privileges cover all oral discussions and written communications between us.

2. If counsel or investigators from the other side of this lawsuit contact you for help with the case, you cannot do so. This would put you in a conflict of interest and would breach our contract and privileged relationship. Should the opponent contact you about this case,

your only response is, “Sorry, I cannot help you.” You cannot state that the reason you are not helping is because you are working for us, because that is revealing a confidence.

3. If any individual associated with the opposing party (e.g., an attorney, an investigator, or an expert or consultant) contacts you with the express purpose of finding out if you are working, or have worked, on this case, you shall let us know who contacted you, when, and what was asked.

If you are contacted by opposition attorneys (or their investigators or experts), it can be a basis for their disqualification from the case and other sanctions, because it is serious misconduct for a legal adversary to exploit privileged communications of the other side.

If you are contacted about the case and you are not certain whether it is permissible for you to talk, call __[me/us]__ before you say anything. You can always call the person back after we resolve the ambiguity.

4. Your obligation of confidentiality is not time-limited. It does not conclude on the resolution of the case in court. Thus, unless __[//we]__ expressly authorize you to disclose information about the case (e.g., by designating you as a witness), you cannot disclose any information about the case to anyone.

5. Sometimes, a case is very interesting and you might wish to discuss it at conferences or professional gatherings with your colleagues. Do not do it. Even discussing the facts without names could give away the identity of the case to a lawyer or expert working for the opposition.

6. You have the responsibility to ensure that employees and other staff members in your office are aware that the confidentiality obligations stated in this contract apply to them as well.

7. All written communications between us should be labeled at the top of the document: CONFIDENTIAL—PRIVILEGED COMMUNICATION.

Please sign this contract and return it to __[me/us]__ . __[//We]__ have enclosed a copy for your files.

Date: _____

__[Name of firm]__

By: __[Signature]__

__[Typed name]__

Attorney for __[name]__

I have read this contract and agree to be bound by its terms.

Date: _____

__[Signature]__

__[Typed name]__

Comment: It is very important to make sure that any consultant you engage has a clear understanding of the extent of the client's right to confidentiality in the lawyer-client relationship. The best way to do this is to put it in writing. Including this information in an engagement agreement is an excellent way to ensure that each consultant you hire understands his or her obligation not to disclose information about the case.

Cross-Reference: On discovery of work product and privileged information, see California Criminal Law Procedure and Practice §11.14 (Cal CEB).

Professional Responsibility

I. OVERVIEW

A. Companion Volume §2.1

I. OVERVIEW

§2.1 A. Companion Volume

This manual is a companion volume to California Criminal Law Procedure and Practice (Cal CEB). This chapter is reserved.

Right to Counsel; The Attorney-Client Relationship

I. OVERVIEW

- A. Legal Fee Agreement **§3.1**
- B. State Bar Sample Fee Agreements **§3.2**
- C. Client Disclosure and Consent **§3.2A**
- D. Letter Notifying Defense Counsel of Substitution of Counsel, and for Release of Information **§3.3**
- E. Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210) **§3.4**
- F. Motion to Remove Defense Counsel **§3.5**
- G. Defense Motion to Be Relieved as Counsel **§3.6**

I. OVERVIEW

§3.1 A. Legal Fee Agreement

**NOTICE: FEES IN THIS CONTRACT ARE NEGOTIABLE;
ATTORNEY FEES ARE NOT SET BY LAW**

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between [name of attorney] , hereafter referred to as "Attorney," and [name of client] , hereafter referred to as "Client."

This agreement is required by Business and Professions Code section 6148 and is intended to fulfill the requirements of that section.

[Option 1: One Fee for Case Through Sentencing]

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: Representation in Case No. [number] , [court, e.g., San Bernardino County Superior

Court] __, now set for arraignment on __[date] __, through disposition, whether by trial, sentencing, or otherwise. No promises or representations have been made, express or implied, regarding the results in this case.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are not to be provided by Attorney under this agreement specifically include, but are not limited to, the following: __[List services excluded, e.g., representation following a mistrial or granting of a motion for a new trial, appellate work, work on any petition for an extraordinary writ, and representation on any other case (including cases related to this case, such as any later probation or parole revocation).] __

If Client wishes Attorney to provide any legal services not included under this agreement, a separate written agreement between Attorney and Client will be required.

4. ATTORNEY FEES. Client will pay to Attorney the fixed sum of __[dollar amount] __ for attorney fees for the legal services to be provided under this agreement, payable in full on or before __[date] __. This payment is nonrefundable even if Client pleads guilty or the case is dismissed.

[Option 2: Fee Structure for Case Up to Trial]

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: making court appearances concerning client's release from custody, plea negotiations, and setting a trial date; preparation of case for trial; and work on plea negotiations, including discussions with prosecution. No promises or representations have been made, express or implied, regarding the results in this case.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. This contract does not cover payment for attorney services for the following:

Appeals to __[the superior court appellate department/the court of appeal/the California Supreme Court/any federal court] __.

Writs or similar proceedings to any court.

Representation in any administrative hearing, even if related to this case.

Representation in any __[probation/parole]__ violation arising out of any case, even if the revocation is triggered by this case.

__[Representation at the preliminary hearing in this case.]__

Representation at the trial in this case.

Representation at evidentiary hearings in this case.

Representation at the sentencing hearing in this case.

Representation at a retrial of this case.

Representation if this case is dismissed and then recharged.

As the case progresses, Attorney will notify Client of any proceedings not covered by this contract that require a new contract and the payment of additional fees.

4. ATTORNEY FEES. Client will pay to Attorney the sum of __[dollar amount]__ for attorney fees for the legal services to be provided under this agreement, payable in full on or before __[date]__. This payment is nonrefundable even if Client pleads guilty or the case is dismissed on the first day Attorney makes a court appearance.

[Continue]

5. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries. Client will be truthful and cooperative with Attorney; keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts; and timely make any payments required by this agreement. Communications between the client and counsel, his or her staff, and a third party whose services are necessary to enable the lawyer to carry out the provisions of the representation are all privileged.

6. COSTS. Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs are separate from attorney fees. Costs include, but are not limited to, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process

server fees. Costs will be advanced by Attorney and then billed to Client, unless the costs can be met out of client deposits that are intended to cover costs.

7. DEPOSIT. Client will pay to Attorney an initial deposit of __[*dollar amount*]__ to be received by Attorney on or before __[*date*]__, and to be applied against costs incurred by Client. This amount will be deposited by Attorney in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the amount of the initial deposit, the difference will be refunded to Client.

Attorney will notify Client whenever the full amount of any deposit has been applied to costs incurred by Client. Within 15 days after each notification is mailed, Client will pay to Attorney an additional deposit in the same amount, and to be applied in the same manner, as the initial one. Deposit of such additional amounts and payment of any interest earned will be made in the same manner as for the initial deposit. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by Client. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the total amount of all deposits, the difference will be refunded to Client.

8. STATEMENTS AND PAYMENTS. Attorney will send Client a monthly statement indicating costs incurred and their basis, any amounts applied from deposits, and any current balance owed. If no costs are incurred for a particular month or if they are minimal, the statement will be held and combined with that for the following month unless a statement is requested by Client. Any balance will be paid in full within 30 days after the statement is mailed.

9. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney and Attorney receives the payment required by Paragraph 4 of this agreement and the initial deposit required by Paragraph 7, provided that the copy, payment, and deposit are received on or before __[*date*]__, or Attorney accepts late receipt.

The foregoing is agreed to by:**Date:** _____

____[Signature of client]____

____[Typed name]____

Client**Date:** _____

____[Signature of attorney]____

____[Typed name]____

Attorney

Comment: When there is potential federal interest in a case, counsel should place in the agreement a *cautionary statement* stating that Bus & P C §6149 makes the fee agreement a “privileged document.” Nonetheless, federal courts have routinely ignored this limitation and have ordered fee agreements produced in spite of the California statute. See California Criminal Law Procedure and Practice §§3.14, 9.16 (Cal CEB).

The State Bar has sample written fee agreement forms and clauses. They are reproduced in §3.2, and they can be obtained from the California State Bar’s website at <http://calbar.ca.gov/>. Three sample legal fee agreements are available: Two are for hourly employment (litigation and non-litigation); the other is for contingent fee agreements. In addition, there are 13 additional sample clauses.

Cross-Reference: For a general discussion of fee agreements, see Fee Agreement Forms Manual, chap 1 (2d ed Cal CEB); Crim Law §3.14.

§3.2**B. State Bar Sample Fee Agreements****THE STATE BAR OF CALIFORNIA
Sample Written Fee Agreement Forms**

(Prepared by the State Bar Committee on Mandatory Fee Arbitration.
Approved by the Board of Governors June 20, 1987; amended effective
November 22, 1996; May 15, 2001; June 23, 2005; March 8, 2010; November 19, 2010)

INSTRUCTIONS AND COMMENTS**I. INTRODUCTION**

Attached are three sample attorney-client fee agreements prepared by the Committee on Mandatory Fee Arbitration of the State Bar of California and approved by the Board of Governors. They are advisory only. They are not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility, or any member of the State Bar.

The first two agreement forms are designed for use in non-contingent fee arrangements. They cover (1) litigation on an hourly basis, and (2) non-litigation on an hourly basis. The third form is for a contingency fee matter. Finally, there are "Other Clauses of Interest in Fee Agreements" which list optional clauses for specific circumstances.

II. OVERVIEW**A. INTENDED PURPOSE AND LIMITATIONS**

The accompanying forms are samples. These "Instructions and Comments" and the forms are intended for use only by attorneys admitted to practice in California, who are expected to utilize their own independent legal and business judgment when evaluating the forms and these comments.

The agreements are in the format of a relatively formal agreement while attempting to eliminate unnecessary "legalese." For those attorneys who prefer a more colloquial style, such as a letter-agreement, the language can be adapted to that format. Attorneys are encouraged to mold the samples to fit their needs.

B. SUMMARY OF THE STATUTES**1. Non-Contingent Fee Agreements**

In non-contingent matters, Section 6148 of the Business and Professions Code requires California attorneys to have written fee agreements with their clients whenever the client's total

expense, including fees, will foreseeably exceed \$1,000 and to provide a duplicate copy of the fully executed agreement to the client.

The fee agreement must state:

Any basis for compensation including, but not limited to, hourly rates, statutory or flat fees, and other standard rates, fees and charges;

The general nature of the legal services to be provided to the client;

(c) The responsibilities of attorney and client under the agreement.

If an attorney fails to comply with the statute, the fee agreement becomes voidable at the client's option, whereupon the attorney is entitled to a "reasonable" fee.

A written fee agreement is not required when services are rendered in an emergency to avoid prejudice to the client or where a writing is otherwise impractical; when the client is a corporation; when the client, after full disclosure, makes a written waiver of the benefits of section 6148; or when the fee agreement is implied in fact by prior services of the same general kind having been rendered to and paid for by the client. The attorney is urged to use caution in relying upon these "exceptions." There can be very few circumstances where a written fee agreement is not advisable.

Section 6148(b) requires attorneys to provide their clients with written billing statements. A client may request such statements at minimum intervals of 30 days. The attorney must provide a statement within 10 days after demand. All statements, whether requested by the client or not, must state "...the amount, rate and basis for calculation or other method of determination of the attorneys fees and costs." (subd.(b)).

2. Contingency Fee Agreements.

In contingency fee agreements, Section 6147 of the Business and Professions Code contains the same requirements as non-contingency fee agreements (discussed above) for a written fee agreement and a duplicate copy of the executed agreement being provided to the client.

There are additional requirements for contingency fee agreements. The agreement must include:

A statement of the contingency fee percentage amount.

A statement as to how disbursements and costs will affect the contingency fee and the client's recovery.

A statement as to what extent, if any, the client could be required to pay any compensation to the

attorney for related matters that arise out of their relationship not covered by their contingency fee agreement. This may include any amounts collected for the client by the attorney.

Unless the claim is subject to the provisions of Business and Professions Code Section 6146 (Claim Against Health Care Provider), a statement that the fee is not set by law but is negotiable between attorney and client.

If the claim is subject to Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee and that the attorney and client may negotiate a lower rate. If the matter involves a claim for injury or damage against a health care provider based upon negligence, the attorney should carefully review Business and Professions Code Section 6146.1.

If any contingency fee agreement does not comply with the statutory provisions, the agreement is voidable at the option of the client, and the attorney is then entitled to a "reasonable" fee.

C. SUMMARY OF RULE OF PROFESSIONAL CONDUCT 3-410

California Rule of Professional Conduct 3-410 requires that California attorneys who know or should know that they do not have professional liability insurance must inform a client in writing, at the time the client engages the attorney, that the attorney does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of legal representation in the client's matter will exceed four hours.

An attorney who must give a client the written disclosure has the option of doing so in the fee agreement. Rule 3-410 suggests the following language for inclusion in the fee agreement or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

Rule 3-410 provides limited exemptions to the disclosure requirement. The written disclosure is not required of attorneys when they are government lawyers or in-house counsel and representing a client in that capacity; when they provide legal services in an emergency to avoid prejudice to the rights or interests of a client; or when they have already advised the client in a fee agreement or separate writing that the attorney does not have professional liability insurance. Attorneys are urged to use caution in relying on the exemptions. Attorneys also should be aware that Rule 3-410 contains a separate written disclosure requirement if the attorney does not provide written notice to the client at the time of the client's engagement of the attorney.

Attorneys are urged to review Rule 3-410 in its entirety.

III. GUIDELINES FOR COMPLIANCE WITH THE STATUTES

Compliance with the statutes requires the judgment of the individual attorney. Forms

alone cannot tell an attorney how to comply. Rather, compliance will result from the attorney's understanding of the statutory provisions and the issues those provisions raise.

A. STANDARD FOR DISCLOSURE

Due to the consumer orientation of the statutes and the fiduciary nature of the attorney-client relationship, the statutes must be examined in the light most favorable to the client. Disclosures required by statute should be accompanied by all additional information necessary to make the disclosure complete, accurate, and not misleading. The statutory requirements should be considered minimum standards.

B. AGREEMENT IN WRITING

To meet the statutory requirement of an agreement in writing, the fee agreement must be signed by both the attorney and the client. An attorney must be firm in requesting that the client sign the agreement before work commences.

C. DISCLOSURE OF STANDARD RATES, FEES AND CHARGES

An attorney should err on the side of inclusion when enumerating standard rates, fees and charges. In an hourly case, fixed or minimum charges for specific functions should be clearly set forth in the agreement to avoid misleading the client. For example, most firms have a minimum billing unit; some charge a minimum time for a telephone call, letter, or court appearance; others charge flat fees for the use of standardized documents developed over the years, or for specific tasks.

Costs and expenses that are passed through should be enumerated in enough detail to avoid misunderstanding. Charges passed through other than "at cost" should be detailed to avoid omitting a "standard rate, fee or charge." Caution should be exercised in "marking up" or "surcharging" costs, as some authorities consider such practices unethical. Caution should also be exercised in charging for items that would be considered general office overhead.

D. NATURE OF SERVICES/DUTIES OF PARTIES

When the statute requires disclosure of the nature of the services to be rendered and the respective duties of the attorney and the client, it simply enumerates two of the indispensable terms of an agreement. When the fee is on an hourly basis, these items can be covered in simple, short generalities. In flat or "premium" fee agreements, however, the scope of the attorney's responsibilities should be defined carefully. In contingency fee agreements, the scope of the services and costs covered and excluded under the percentage fee is especially important.

E. BILLS: AMOUNT, RATE AND BASIS

All bills must state the amount, rate and basis for calculation (or other method of determination) of the attorney's fees and costs. A bill that simply states "for services rendered" is not sufficient. In an hourly case, the bill should describe the services, identify the attorneys who performed services, the time each expended, their hourly rates and the resulting fee for each

attorney's time. In other types of cases, such as flat or premium fees, the bill should refer to the "basis of calculation" which should be set forth in the fee agreement. Bills for costs and expenses must clearly identify the costs and expenses and provide the amount of the costs and expenses incurred. It is recommended that costs be individually itemized.

F. EXEMPTIONS

Except for the provision exempting corporate clients from the required disclosures, the exemptions in the statute are narrow. Attorneys should rely on these exemptions with caution.

G. BREVITY AND CLARITY v. COMPLETE DISCLOSURE

The statute embraces two potentially inconsistent goals: detailed disclosure on one hand, and information in an understandable format on the other. Each attorney should strive to strike a balance between these goals when drafting fee agreements. In addition to a proper agreement, it is suggested that the attorney take the time and effort to explain the terms of the agreement and to determine that the client fully understands its terms.

IV. INSTRUCTIONS

A. FORM NO. 1: HOURLY LITIGATION

1. Conditions (Par. 1) and Effective Date (Par. 14)

At the threshold, the attorney must determine at what point the agreement comes to life. Until it does, there is no written agreement that complies with the statute. Once it does, the attorney is obligated to render services, even if the client has not paid. If services are performed before the written agreement takes effect, the attorney will be limited to a "reasonable" fee. This form and the other samples embody one solution to these intertwined issues. It is not the only solution, nor will it always be the best solution.

Par. 1 (Conditions) interacts closely with Par. 14 (Effective Date). Working together, the two clauses are designed to delay the attorney's obligation to perform services until the client signs the agreement and pays the deposit; however, the clauses also are drafted to bring within the agreement any services performed before signing and payment. The delay in the attorney's obligation to perform services is based on a cautious reading of the statute's written agreement requirement. We assume that no written agreement exists until both parties sign and perform the conditions precedent. At the same time, however, we recognize that attorneys frequently will (or must) perform services before signing and payment; they will often do so under circumstances that will not fall within the statute's exemptions for emergencies or impracticality. For that reason, "premature" services are brought under the agreement's protection; upon signing and payment the agreement will take effect, but retroactively to the date the attorney first performed services. Without the retroactivity provision compensation for "premature" services would be limited to a reasonable fee, because the services were performed without a written agreement.

Of course, if the agreement never takes effect, then the statutory penalty limits the

attorney to the reasonable value of any services performed.

If the attorney expects to perform services before the agreement is signed and the deposit paid, then the attorney should document the facts in a writing, preferably one signed by the client.

Likewise, document reliance on any statutory exemptions, such as emergency or impracticality.

2. Scope and Duties (Par. 2 and Par. 3)

Fill in a brief description of the subject of the representation (Par. 2). This is a statutory requirement. Enumeration of the client's and attorney's duties likewise is required by the statute (Par. 3).

The scope of services provided excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.

3. Deposit (Par. 4)

This is an optional clause. Fill in the amount of any deposit and the date by which it must be paid. An attorney cannot withdraw funds from the trust account without the client's express authorization. We have provided for that authorization. If a more cautious approach to the authorization question is preferred, the attorney might provide that sums will be withdrawn from the trust account only after they are invoiced to client and "x" days pass without client's protest of any of the charges.

The attorney need not require a deposit of any kind. This paragraph sets forth one way to handle the deposit if the attorney opts for one. This clause places a ceiling on further deposits. Without a ceiling, the right to require further deposits is so open-ended that it might be unenforceable for uncertainty. In addition, provision is made for advance payment of all fees and costs to be incurred in preparing for and conducting trial or arbitration. Because it is calculated based on objective facts, no ceiling has been placed on the pre-trial deposit.

The "Replenishing Deposit" clause provided in the "Additional Provisions" forms may be used as an alternative.

4. Legal Fees (Par. 5)

The attorney must inform the client in the fee agreement whether and under what conditions rates are subject to change.

Also, the attorney should add any standard or minimum time or dollar charges for specific functions—for example, "x" hours for a telephone call or letter. Failure to disclose such practices probably misleads the client when the agreement states that fees are charged by the

actual time by the hour and some fraction of an hour.

Some firms either do not charge for travel time or charge at reduced rates. The attorney should discuss this with the client.

5. Costs and Expenses (Par. 6)

This is not an inclusive list. The attorney may include more or less. The attorney should disclose the rate or charge for any items not passed through strictly at cost; if not done, the attorney may violate the statute's requirement that standard rates, fees and charges be disclosed.

A Rate Schedule should be included for charges that are not usually passed through strictly at cost. All such charges should be enumerated to comply with the statute's requirement that attorneys disclose their standard rates, fees and charges.

The attorney should specifically address how air travel other than economy, hotel accommodations and meals will be charged.

The sample paragraph allows the attorney to incur costs and retain consultants, etc., without client consent. Optional clauses, to be initialed by the client, would require client approval before costs in excess of a specific dollar amount or of a certain nature, (e.g., experts) were incurred.

Language is included notifying the client that in certain cases, it may be the client's responsibility to pay other parties' costs.

6. Billing Statements (Par. 7)

Attorneys' statements shall describe the services rendered, and must state the "basis" of the charges, including the amount, rate, and basis for calculation or other method of determination of fees and costs.

7. Lien (Par. 8)

This is an optional clause, but is recommended for the attorney's protection. The California Supreme Court has determined that a lien in an hourly fee case gives the attorney an interest adverse to the client, and therefore the attorney must comply with Rule 3-300 of the Rules of Professional Conduct by fully disclosing the acquisition and terms of the lien and transmitting that information to the client in writing in a manner which should reasonably be understood by the client, advising the client in writing that the client may seek the advice of an independent lawyer of the client's choice, and giving the client a reasonable opportunity to seek that advice before the client gives written consent to the lien. The Supreme Court left open whether the same requirements must be met for a valid lien in a contingent fee case, but caution dictates that the same procedure be followed.

8. Discharge and Withdrawal (Par. 9)

This clause is declaratory of applicable law and the Rules of Professional Conduct.

9. Disclaimer of Guarantee (Par. 10)

This is an optional clause.

10. Construction Clauses (Pars. 11 - 13)

These are optional clauses found in many formal agreements.

B. FORM NO. 2: HOURLY NON-LITIGATION

With the exceptions and additions recited below, the comments on the Hourly-Litigation Form apply equally to the Hourly Non-Litigation Form.

1. Scope and Duties (Par. 2)

An exclusion for litigation has been added.

2. Client's Duties (Par. 3)

References to appearances at legal proceedings are deleted.

3. Deposit (Par. 4)

References to trial and arbitration dates and related fees are deleted.

4. Costs and Expenses (Par. 6)

Reference to litigation-related costs is deleted.

5. Lien

The attorney's lien has been deleted because it may be inappropriate in a non-litigation context.

C. FORM NO. 3: CONTINGENCY FEE

With the exceptions and additions recited below, the comments on the Hourly Litigation Form 1 apply equally to the Contingency Form 3.

1. Conditions (Par. 1) and Effective Date (Par. 19)

The instructions for these paragraphs are the same as those for the Hourly Litigation Form, Paragraphs 1 and 14.

Scope of Services (Par. 2), Responsibility of the Parties (Par. 3), and Limitation of Representation (Par. 10)

Fill in the defendant's name, the nature of the event giving rise to the claim and the date (Par. 2). This paragraph and Paragraph 10 (Limitation of Representation), describe the scope and limitations of the representation. A description of the subject of the representation is a statutory requirement. Enumeration of the client's and attorney's responsibilities likewise is required by the statute (Par. 3).

The point at which the covered services ends should be carefully defined to avoid any question of the obligation to provide additional services without additional fees. The scope of services in the sample excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and should be consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.

The scope of representation is also limited to the specific matter defined in Paragraph 2. Business and Professions Code Section 6147 requires a statement as to what extent, if any, the client could be required to pay any compensation to the attorney that arises out of their relationship but is not covered by the contingency fee agreement. The sample (Par. 10) provides that representation as to related matters will require a separate agreement. As to the related matter of defending the client on cross-complaints, the option of a separate agreement or engaging separate counsel is given. Here again, the attorney may broaden the scope of the services to include those related matters which are excluded in the sample.

3. Legal Fees (Par. 4)

As required by statute, this paragraph explains the contingency on which fees become due, the method of calculation of fees at various points in the litigation, and deduction of costs. An optional clause includes non-monetary proceeds as part of the net recovery on which the fees are based. If this clause is used, consideration should be given to whether or not to enumerate the potential non-monetary items, e.g., the value of continued insurance coverage.

Neither the particular stages in litigation at which the percentage of the fee changes, nor the specific basis for computation of a reasonable fee in the event of discharge, should be viewed as being endorsed by the State Bar. It should be noted that no specific contingency fee amounts are recommended in these forms. These provisions are illustrative only. Other provisions may be more appropriate in particular cases.

Business and Professions Code Section 6147 provides that a reasonable fee is owed in the event of failure to comply with the statute, and existing case law provides for payment of a reasonable fee in the event of discharge of the attorney by the client prior to occurrence of the contingency on which fees become due. Accordingly, this paragraph states that the reasonable fee in such a case is payable on the occurrence of the contingency and provides assistance in the determination of the amount of a fee which may be considered reasonable.

4. Negotiability of Fees (Par. 5)

This statement is required by statute.

5. Billing Statements (Par. 8)

This optional paragraph is intended for use in the event the client is to pay costs as the litigation progresses, rather than deducting all costs from the recovery.

6. Approval Necessary for Settlement (Par. 9)

This provision is optional.

7. Discharge and Withdrawal (Par. 11)

This is declaratory of applicable law and rules. Together with Paragraphs 4 (Legal Fees), 12 (Conclusion of Services) and 13 (Lien), this paragraph notifies the client of payment obligations if the attorney is discharged or withdraws.

8. Conclusion of Services (Par. 12)

Returning the file and other property is required under existing law and the Rules of Professional Conduct.

9. Receipt of Proceeds (Par. 14)

This is an optional clause.

10. Disclaimer of Guarantee (Par. 15)

This is an optional clause.

11. Construction Clauses (Pars. 16 - 18)

These are optional clauses found in many formal agreements.

V. ADDITIONAL PROVISIONS

There are innumerable additional provisions that an attorney may include in a fee agreement. The following are several which the attorney may wish to consider. All of these clauses are optional.

1. Arbitration Clause

An attorney should consult the firm's malpractice insurance carrier regarding its position

on arbitration and particular arbitration provisions, including any award of attorney's fees.

The suggested clause is appropriate for binding arbitration of all claims other than fee disputes which are subject to non-binding arbitration under Business and Professions Code Sections 6200, et seq. Such clauses may only be enforceable with full disclosure to the client of the ramifications of those choices and the comparative advantages and disadvantages of other alternatives. This clause advises the client of the right to have an independent attorney review it, and requires initialing to approve it.

2. Mediation Clause

This is an optional clause. Under Business and Professions Code Section 6200, a mediation option may be offered to the parties after the attorney or client files a request for fee arbitration with some local bar association or the State Bar fee arbitration programs.

The attorney may want to consider this in determining whether to include a pre-filing mediation clause such as the suggested clause.

3. Interest Clause

It is legally and ethically proper to charge interest on fees. If the attorney elects to do so, this clause provides appropriate language. Please keep in mind that interest, if charged, must be reasonable so as not to violate either the prohibition against unconscionable fees nor the usury provisions of the California Constitution. It must be simple interest, made a part of the agreement, and separately stated as an increment on the monthly or other periodic billing. Generally, interest should begin running only after a certain specified period, i.e., thirty, sixty or ninety days after the billing invoice is rendered, if not paid within that time.

If the Agreement uses the terms "finance charges," "late fees," "penalty payment" or anything other than simple interest, this may create problems with the Federal Truth In Lending Law and the California Unruh Act.

4. Replenishing Deposit

This is an alternative to Par. 4 in Forms 1 and 2, and provides for an automatically replenishing deposit.

5. Attorneys' Fees Clause

An attorneys' fees clause is permitted, except that attorneys' fees are not recoverable in fee arbitrations under Business and Professions Code Sections 6200, et seq. Further, an attorney may not usually recover fees for representing him or herself. If this clause and an arbitration clause are both used, the attorneys' fee provisions should be the same. Inclusion of this clause should be cleared with the attorney's malpractice insurance carrier.

6. Other Payor Clauses

These clauses may be appropriate where someone other than the client is responsible for paying the attorney's fees, and may be used only in compliance with Rule 3-310(F) of the Rules of Professional Conduct.

7. Fixed Fee Clause

This clause is a suggested alternative to Paragraph 5 (Legal Fees and Billing Practices) where the work is being performed on a fixed fee basis.

8. Other Attorney Clauses

See California Rules of Professional Conduct Rule 2-200(A). These clauses may be appropriate where the attorney contemplates working with another attorney who is not a partner, associate or shareholder of the attorney. Charging associate counsel fees as a cost in an hourly fee case is appropriate, but is a suspect practice in contingency fee litigation. Separate sample clauses are therefore offered for hourly and contingency fee cases.

9. Professional Liability Insurance Clause

See California Rules of Professional Conduct Rule 3-410. An attorney who knows or should know that he or she does not have professional liability insurance at the time of the client's engagement of the attorney must make a written disclosure to the client, subject to limited exemptions listed in the rule. Rule 3-410 suggests the language of this clause for inclusion in the fee agreement or in a separate writing.

VII. CONCLUSION

These forms are disseminated in the hope that they will be useful to attorneys in their practices. Attorneys are urged to make alterations to these forms so that they conform to the attorney's practice and the needs and requirements of the attorney and clients, subject always to satisfying the statutory requirements for fee agreements and the Rules of Professional Conduct.

Form No. 1
Sample Written Fee Agreement*
Hourly Litigation

CRANE, GARCIA & MOORE
 441 Bauchet Street
 Los Angeles, CA 90012
 (213) 680-9600

(Date)

ATTORNEY-CLIENT FEE AGREEMENT

CRANE, GARCIA & MOORE ("Attorney") and **STELLA KING** ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 4.

2. SCOPE OF SERVICES. Client hires Attorney to provide legal services in the following matter: _____
 [describe matter]. Attorney will provide those legal services reasonably required to represent Client. Attorney will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. If a court action is filed, Attorney will represent Client through trial and post-trial motions. This Agreement does not cover representation on appeal or in execution proceedings after judgment. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written agreement.

3. CLIENT'S DUTIES. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time, and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing necessary information and documents and will appear when necessary at legal proceedings.

4. DEPOSIT. Client agrees to pay Attorney an initial deposit of \$ _____ by _____. The hourly charges will be charged against the deposit. The initial deposit, as well as any future deposit, will be held in a trust account. Client authorizes Attorney to use _____

* This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

that fund to pay the fees and other charges as they are incurred. Payments from the fund will be made upon remittance to client of a billing statement. Client acknowledges that the deposit is not an estimate of total fees and costs, but merely an advance for security.

Whenever the deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of \$ _____ before a trial or arbitration date is set. Once a trial or arbitration date is set, Client shall pay all sums then owing and deposit the attorneys' fees estimated to be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees, expert witness fees and other costs likely to be assessed. Those sums may exceed the maximum deposit.

Client agrees to pay all deposits after the initial deposit within _____ days of Attorney's demand. Unless otherwise agreed in writing, any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners-----/hour
Partners-----/hour
Associates-----/hour
Paralegals-----/hour
Law clerks-----/hour

The rates on this schedule are subject to change on 30 days' written notice to Client. If Client declines to pay increased rates, Attorney will have the right to withdraw as attorney for Client.

The time charged will include the time Attorney spends on telephone calls relating to Client's matter, including calls with Client, witnesses, opposing counsel or court personnel. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting, court hearing or other proceeding, each will charge for the time spent. Attorney will charge for waiting time in court and elsewhere and for travel time, both local and out of town.

Time is charged in minimum units of one-tenth (.1) of an hour. The following have higher minimum charges:

Telephone calls:
Letters:
Other:

6. COSTS AND OTHER CHARGES.

(a) Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include, service of process charges, filing fees, court and deposition reporters' fees, jury fees, notary fees, deposition costs, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultants' fees, expert witness, professional, mediator, arbitrator and/or special master fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Attorney's cost.

In-office photocopying	/page
Facsimile charges	/page
Mileage	/mile
Other:	

(b) Out of town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorney's personnel. Client will also be charged the hourly rates for the time legal personnel spend traveling.

(c) Experts, Consultants and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants or investigators. Client agrees to pay such fees and charges. Attorney will select any expert witnesses, consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

Additionally, Client understands that if the matter proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such payment will be entirely the responsibility of Client.

7. **BILLING STATEMENTS.** Attorney will send Client periodic statements for fees and costs incurred. Each statement will be payable within _____ days of its mailing date. Client may request a statement at intervals of no less than 30 days. If Client so requests, Attorney will provide one within 10 days. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

8. **LIEN.** Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of the representation under this Agreement. The lien will be for any sums owing to Attorney at the conclusion of services performed. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

_____ (Client Initial Here) _____ (Attorney Initial Here)

9. **DISCHARGE AND WITHDRAWAL.** Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client's request, deliver Client's file, and property in Attorney's possession unless subject to the lien provided in Paragraph 8 above, whether or not Client has paid for all services.

10. **DISCLAIMER OF GUARANTEE AND ESTIMATES.** Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Attorney shall not be a guarantee. Actual fees may vary from estimates given.

11. **ENTIRE AGREEMENT.** This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

12. **SEVERABILITY IN EVENT OF PARTIAL INVALIDITY.** If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

13. **MODIFICATION BY SUBSEQUENT AGREEMENT.** This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them, or an oral agreement only to the extent that the parties carry it out.

14. **EFFECTIVE DATE.** This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

_____ STELLA KING

Address: _____

Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: _____

Linda H. Garcia, Partner

Form No. 2
Sample Written Fee Agreement*
Hourly Non-Litigation

CRANE, GARCIA & MOORE
 441 Bauchet Street
 Los Angeles, CA 90012
 (213) 680-9600

(Date)

CRANE, GARCIA & MOORE ("Attorney") and STELLA KING ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. **CONDITIONS.** This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 4.

2. **SCOPE OF SERVICES.** Client hires Attorney to provide legal services in the following matter: _____ [describe matter]. Attorney will provide those legal services reasonably required to represent Client. Attorney will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. This Agreement does not cover litigation services of any kind, whether in court, arbitration, administrative hearings, or government agency hearings. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written agreement.

3. **CLIENT'S DUTIES.** Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing information and documents necessary for the representation in the described matter.

4. **DEPOSIT.** Client agrees to pay Attorney an initial deposit of \$_____ by _____.

The hourly charges will be charged against the deposit. The initial deposit, as well as any future deposit, will be held in a trust account. Client authorizes Attorney to use that fund to pay the fees and other charges as they are incurred. Payments from the fund will be made upon remittance to Client of a billing statement. Client acknowledges that the deposit is not an estimate of total fees and costs, but merely an advance for security.

*This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case.

Whenever the deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of \$ _____.

Client agrees to pay all deposits after the initial deposit within ____ days of Attorney's demand. Unless otherwise agreed in writing, any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners-----/hour
Partners-----/hour
Associates-----/hour
Paralegals-----/hour
Law clerks-----/hour

The rates on this schedule are subject to change on 30 days' written notice to client. If Client declines to pay any increased rates, Attorney will have the right to withdraw as Attorney for Client.

The time charged will include the time Attorney spends on telephone calls relating to Client's matter, including calls with Client and other parties and attorneys. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting or other proceeding, each will charge for the time spent. Attorney will charge for waiting time and for travel time, both local and out of town.

Time is charged in minimum units of one tenth (. 1) of an hour. The following have higher minimum charges:

Telephone calls:
Letters:
Other:

6. COSTS AND OTHER CHARGES.

(a) In general, Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include fees fixed by law or assessed by public agencies, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses and consultants' fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Attorney's cost.

In-office photocopying	/page
Facsimile charges	/page
Mileage	/mile
Other:	

(b) Out of town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorneys personnel. Client will also be charged the hourly rates for the time legal personnel spend travelling.

(c) Consultants and Investigators. To aid in the representation in Client's matter, it may become necessary to hire consultants or investigators. Client agrees to pay such fees and charges. Attorney will select any consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

7. **BILLING STATEMENTS.** Attorney will send Client periodic statements for fees and costs incurred. Each statement will be payable within _____ days of its mailing date. Client may request a statement at intervals of no less than 30 days. If Clients requests, Attorney will provide one within 10 days. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

8. **DISCHARGE AND WITHDRAWAL.** Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client's request, deliver Client's file-and property in Attorney's possession, whether or not Client has paid for all services.

9. **DISCLAIMER OF GUARANTEE AND ESTIMATES.** Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Attorney shall not be a guarantee. Actual fees may vary from estimates given.

10. **ENTIRE AGREEMENT.** This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

11. **SEVERABILITY IN EVENT OF PARTIAL INVALIDITY.** If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

12. **MODIFICATION BY SUBSEQUENT AGREEMENT.** This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by

both of them or an oral agreement only to the extent that the parties carry it out.

13. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

STELLA KING

Address: _____

Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: _____

Linda H. Garcia, Partner

**Form No. 3
Contingency Fee Agreement***

CRANE, GARCIA & MOORE
441 Bauchet Street
Los Angeles, CA 90012
(213) 680-9600

(Date)

ATTORNEY-CLIENT CONTINGENCY FEE AGREEMENT

CRANE, GARCIA & MOORE ("Attorney"), and **STELLA KING** ("Client") hereby agree that Attorney will provide legal services to "Client" on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit, if any, called for under Paragraph 7.

2. SCOPE OF SERVICES. Client is hiring Attorney to represent Client in the matter of Client's claims against _____ [and possibly others as future investigation may indicate], arising out of _____ which occurred on or about _____.

If a court action is filed, Attorney will represent Client until a settlement or judgment, by way of arbitration or trial, is reached. Attorney will oppose any motion for a new trial or any other post-trial motions filed by an opposing party, or will make any appropriate post-trial motions on Client's behalf. After judgment, Attorney will not represent Client on any appeal, or in any proceeding to execute on the judgment, unless Client and Attorney agree that Attorney will provide such services and also agree upon additional fees, if any, to be paid to Attorney for such services. Services in any matter not described above will require a separate written agreement.

3. RESPONSIBILITIES OF THE PARTIES. Attorney will provide those legal services reasonably required to represent Client in prosecuting the claims described in Paragraph 2 and will take reasonable steps to keep Client informed of progress and developments, and to respond promptly to inquiries and communications. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information and developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills for costs on time, and to keep Attorney advised of Client's address, telephone number and whereabouts. Client agrees to appear at all legal proceedings when Attorney deems it necessary, and generally to cooperate fully with Attorney in all matters related to the preparation and presentation of Client's claims.

*This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case.

4. LEGAL FEES. Attorney will only be compensated for legal services rendered if a recovery is obtained for Client. If no recovery is obtained, Client will be obligated to pay only for costs, disbursements and expenses, as described in Paragraph 6.

The fee to be paid to Attorney will be a percentage of the "net recovery," depending on the stage at which the settlement or judgment is reached. The term "net recovery" means: (1) the total of all amounts received by settlement, arbitration award or judgment, including any award of attorneys fees, (2) minus all costs and disbursements set forth in Paragraph 6. [Net recovery shall also include the reasonable value of any non-monetary proceeds.]

Attorney's fee shall be calculated as follows:

If the matter is resolved before filing a lawsuit or formal initiation of proceedings, then Attorney's fee will be _____ percent (____%) of the net recovery;

If the matter is resolved prior to ____ days before the date initially set for the trial or arbitration of the matter then Attorney's fee will be _____ percent (____%) of the net recovery; and

If the matter is resolved after the times set forth in (i) and (ii), above, then Attorney's fee will be _____ percent (____%) of the net recovery.

In the event of Attorney's discharge or withdrawal as provided in Paragraph 11, Client agrees that, upon payment of the settlement, arbitration award or judgment in Client's favor in this matter, Attorney shall be entitled to be paid by Client a reasonable fee for the legal services provided. Such fee shall be determined by considering the following factors:

The actual number of hours expended by Attorney in performing legal services for Client;

Attorney's hourly rates;

The extent to which Attorney's services have contributed to the result obtained;

The amount of the fee in proportion to the value of the services performed;

the amount of recovery obtained;

Time limitations imposed on Attorney by Client or by the circumstances; and

The experience, reputation and ability of personnel performing the services.

5. NEGOTIABILITY OF FEES. The rates set forth above are not set by law, but are negotiable between an attorney and client.

6. COSTS AND LITIGATION EXPENSES. Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses paid or owed by Client in connection with this matter, or

which have been advanced by Attorney on Client's behalf and which have not been previously paid or reimbursed to Attorney. Costs, disbursements and litigation expenses commonly include court fees, jury fees, service of process charges, court and deposition reporters' fees, photocopying and reproduction costs, notary fees, long distance telephone charges, messenger and other delivery fees, postage, deposition costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultant, expert witness, professional mediator, arbitrator and/or special master fees and other similar items. Except for the items listed below, costs and expenses will be charged at Attorney's cost.

In-office photocopying	/page
Facsimile charges	/page
Mileage	/mile
Other:	

Client understands that, as set forth in Paragraph 7 below, a deposit for costs may be required before the expenditure is made by Attorney.

To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants or investigators. Attorney will select any expert witnesses, consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants or expert witnesses reasonably necessary in Attorney's judgment unless one or both of the clauses below are initialed by Attorney.

Attorney shall obtain Client's consent before incurring any costs in excess of \$_____.

Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

If an award of fees and/or costs is sought on Client's behalf in this action, Client understands that the amount which the court may order as fees and/or costs is the amount the court believes the party is entitled to recover, and does not determine what fees and/or costs Attorney is entitled to charge Client or that only the fees and/or costs which were allowed were reasonable. Client agrees that, whether or not attorneys' fees or costs are awarded by the court in Client's case, Client will remain responsible for the payment, in full, of all attorneys' fees and costs in accordance with this Agreement.

Additionally, Client understands that if Client's case proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such award will be entirely the responsibility of Client.

7. DEPOSIT. Client agrees to pay Attorney an initial deposit for costs of \$_____, to be returned with this signed Agreement. Attorney will hold this initial deposit in a trust account. Client hereby authorizes Attorney to use that deposit to pay the costs,

disbursements and other expenses incurred under this Agreement.

When Client's deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of \$_____.

Once a trial or arbitration date is set, Attorney will require Client to pay all sums then owing, and to deposit the costs Attorney estimates will be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees likely to be assessed. Those sums may exceed the maximum deposit.

Client agrees to pay all deposits required under this Agreement within 10 days of Attorney's demand. Any deposit that is unused at the conclusion of Attorney's services will be refunded.

8. MONTHLY BILLING STATEMENTS. Attorney will send Client monthly billing statements for costs, disbursements and expenses incurred in connection with this matter. Each statement is to be paid in full within 15 days after the date of such statement.

9. APPROVAL NECESSARY FOR SETTLEMENT. Attorney will not make any settlement or compromise of any nature of any of Client's claims without Client's prior approval. Client retains the absolute right to accept or reject any settlement. Client agrees to consider seriously any settlement offer Attorney recommends before making a decision to accept or reject such offer. Client agrees not to make any settlement or compromise of any nature of any of Client's claims without prior notice to Attorney.

10. LIMITATION OF REPRESENTATION. Attorney is representing Client only on the matter described in Paragraph 2. Attorney's representation does not include independent or related matters that may arise, including, among other things, claims for property damage, workers' compensation, disputes with a health care provider about the amount owed for their services, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy.

This Agreement also does not include defending Client against, or representing Client in any claims that may be asserted against Client as a cross-claim or counter-claim in Client's case. This Agreement does not apply to any other legal matters. If any such matters arise later, Attorney and Client will either negotiate a separate agreement if Client and Attorney agree that Attorney will perform such additional legal work or Client will engage separate counsel with respect to the cross-claim or counter-claim or additional legal work.

11. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time, upon written notice to Attorney. Attorney may withdraw from representation of Client (a) with Client's consent, (b) upon court approval, or (c) if no court action has been filed, for good cause and upon reasonable notice to Client. Good cause includes Client's breach of this contract, Client's refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical.

Notwithstanding Attorney's withdrawal or Client's notice of discharge, and without regard to the reasons for the withdrawal or discharge, Client will remain obligated to pay Attorney for all costs incurred prior to the termination and, in the event that there is any net recovery obtained by Client after conclusion of Attorney's services, Client remains obligated to pay Attorney for the reasonable value of all services rendered from the effective date of this Agreement to the date of discharge.

12. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges will immediately become due and payable. Attorney is authorized to use any funds held in Attorney's trust account as a deposit against costs to apply to such unpaid charges. After Attorney's services conclude, upon request, Client's file and property will be delivered to Client, or Client's other attorney, whether or not Client has paid any fees and/or costs owed to Attorney.

13. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs, or attorneys' fees, at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's own choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

_____ (Client initials here) _____ (Attorney initials here)

14. RECEIPT OF PROCEEDS. All proceeds of Client's case shall be deposited into Attorney's trust account for disbursement in accordance with the provisions of this Agreement.

15. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of this matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of this matter are expressions of opinion only. Client acknowledges that Attorney has made no promise or guarantees about the outcome.

16. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement or promise made on or before the effective date of this Agreement will be binding on the parties.

17. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

18. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may

the parties have agreed to binding arbitration and either party rejects the award and requests a trial de novo within 30 days after the award is mailed to the parties. If, after receiving a notice of client's right to arbitrate, Client does not elect to proceed under the State Bar fee arbitration procedures, and file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as provided in the previous paragraph A.

[Optional provision: If either party rejects a non-binding fee arbitration award by timely submission of a request for trial de novo, Attorney and Client agree that in lieu of a trial de novo in court, the trial after arbitration shall be binding arbitration pursuant to the provisions of paragraph 1, above.]

2. MEDIATION CLAUSE

If a dispute arises out of or relating to any aspect of this Agreement between Attorney and Client, or the breach thereof, and if the dispute cannot be settled through negotiation, Attorney and Client agree to first try in good faith to settle the dispute by private mediation or fee mediation provided by local bar association programs before resorting to arbitration, litigation, or any other dispute resolution procedure. The cost of such mediation shall be borne equally by the parties, unless otherwise stipulated in a settlement agreement between the parties.

3. INTEREST CHARGES

If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

[Interest may not be compounded without compliance with the California Civil Code, Appendix I, dealing with usury.]

4. REPLENISHING DEPOSIT

To commence the representation, Client has provided [must provide] Attorney with a \$_____ deposit. Attorney will hold the deposit in Attorney's trust account and apply it to each statement when rendered by Attorney. Client will pay any additional balance due upon receipt of Attorney's statements each month and also will replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement, in which event Client will be responsible for any amount due over and above the deposit or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

5. SECURITY DEPOSIT

Attorney's obligation to render services to Client will be subject to Attorney's receipt of a refundable security deposit of \$_____.

Notwithstanding Attorney's withdrawal or Client's notice of discharge, and without regard to the reasons for the withdrawal or discharge, Client will remain obligated to pay Attorney for all costs incurred prior to the termination and, in the event that there is any net recovery obtained by Client after conclusion of Attorney's services, Client remains obligated to pay Attorney for the reasonable value of all services rendered from the effective date of this Agreement to the date of discharge.

12. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges will immediately become due and payable. Attorney is authorized to use any funds held in Attorney's trust account as a deposit against costs to apply to such unpaid charges. After Attorney's services conclude, upon request, Client's file and property will be delivered to Client, or Client's other attorney, whether or not Client has paid any fees and/or costs owed to Attorney.

13. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs, or attorneys' fees, at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's own choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

____ (Client initials here) _____ (Attorney initials here)

14. RECEIPT OF PROCEEDS. All proceeds of Client's case shall be deposited into Attorney's trust account for disbursement in accordance with the provisions of this Agreement.

15. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of this matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of this matter are expressions of opinion only. Client acknowledges that Attorney has made no promise or guarantees about the outcome.

16. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement or promise made on or before the effective date of this Agreement will be binding on the parties.

17. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

18. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may

the parties have agreed to binding arbitration and either party rejects the award and requests a trial de novo within 30 days after the award is mailed to the parties. If, after receiving a notice of client's right to arbitrate, Client does not elect to proceed under the State Bar fee arbitration procedures, and file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as provided in the previous paragraph A.

[Optional provision: If either party rejects a non-binding fee arbitration award by timely submission of a request for trial de novo, Attorney and Client agree that in lieu of a trial de novo in court, the trial after arbitration shall be binding arbitration pursuant to the provisions of paragraph 1, above.]

2. MEDIATION CLAUSE

If a dispute arises out of or relating to any aspect of this Agreement between Attorney and Client, or the breach thereof, and if the dispute cannot be settled through negotiation, Attorney and Client agree to first try in good faith to settle the dispute by private mediation or fee mediation provided by local bar association programs before resorting to arbitration, litigation, or any other dispute resolution procedure. The cost of such mediation shall be borne equally by the parties, unless otherwise stipulated in a settlement agreement between the parties.

3. INTEREST CHARGES

If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

[Interest may not be compounded without compliance with the California Civil Code, Appendix I, dealing with usury.]

4. REPLENISHING DEPOSIT

To commence the representation, Client has provided [must provide] Attorney with a \$_____ deposit. Attorney will hold the deposit in Attorney's trust account and apply it to each statement when rendered by Attorney. Client will pay any additional balance due upon receipt of Attorney's statements each month and also will replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement, in which event Client will be responsible for any amount due over and above the deposit or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

5. SECURITY DEPOSIT

Attorney's obligation to render services to Client will be subject to Attorney's receipt of a refundable security deposit of \$_____.

Attorney will apply \$_____ of that deposit to the first fees and costs billed to Client pursuant to this Agreement, and will retain the remainder of the deposit in Attorney's trust account as security for Client's obligations to make timely payment of fees and costs pursuant to this Agreement. Attorney will thereafter apply the remaining deposit against what appears to be the last billing for the services rendered to Client pursuant to this Agreement. Client agrees to provide an additional security deposit of \$_____ at least 120 days prior to the first scheduled trial date of the matter.

6. ATTORNEYS' FEES CLAUSE

The prevailing party in any action or proceeding arising out of or to enforce any provision of this Agreement, with the exception of a fee arbitration or mediation under Business and Professions Code Sections 6200-6206, will be awarded reasonable attorneys' fees and costs incurred in that action or proceeding, or in the enforcement of any judgment or award rendered.

7. OTHER PAYOR CLAUSE – INSURANCE

Client has informed Attorney that Client may have insurance coverage which may pay for some or all of Attorney's fees which may become due under this Agreement. Attorney will make a claim with the insurer for compensation. It is understood, however, that if the insurance provider refuses or fails to pay Attorney for any reason, Client shall remain responsible for paying all Attorney's statements as they are rendered upon the billing and payment terms set forth in this Agreement. Should the insurance provider pay only a portion of the fees and costs, Client shall be responsible for the balance.

8. OTHER PAYOR CLAUSE – PERSONAL

Client has informed Attorney that Client has arranged for [employer/relative-name and relationship] to be responsible for some or all of Attorney's fees which may become due under this Agreement. It is understood that should [name] fail for any reason to pay Attorney's statements as they become due, Client shall remain responsible for paying all Attorney's statements as they are rendered upon the billing and payment terms set forth in this Agreement.

It is understood that the attorney/client relationship will only exist between Attorney and Client, and that [employer/relative name] will have no right to information regarding the representation of Client by Attorney, and have no right to control or direct the Attorney in providing the services under this Agreement, unless specifically approved by Client.

[Note: Provide signature line for employer/relative in Agreement.]

9. FIXED FEE CLAUSE

Client agrees to pay a fixed fee of \$_____ for Attorney's services under this Agreement. The fixed fee is due by _____. Attorney shall have no obligation to provide services to Client until the fixed fee is paid in full. Unless Attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under this

Agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed.

10. "OTHER ATTORNEY" CLAUSE – CONTINGENCY

It is agreed that Attorney will associate with another attorney, [name], who will assist Attorney regarding the representation. [Name] will be compensated out of the fees which Attorney otherwise will earn under this Agreement based upon the effort and time he/she puts into the case. Attorney will divide the total fees received from the representation with [name], and the terms of the division will be [specify the terms of fee division]. This division of fees will not increase the fee due from Client should Attorney obtain a recovery on behalf of Client.

11. "OTHER ATTORNEY" CLAUSE – HOURLY

It is agreed that Attorney will associate with another attorney, [name], who will assist Attorney regarding the representation. [Name] will be compensated by Attorney on an hourly basis at a rate of \$_____ per hour. These charges will be billed by Attorney to Client as a cost as defined in this Agreement. [Option: or "billed directly to Client by the other attorney."].

[Note: not suitable for use in contingency fee cases.]

12. PROFESSIONAL LIABILITY INSURANCE DISCLOSURE

Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.

Comment: These sample fee agreement forms are available from the California State Bar. Form No. 1 is to be used for hourly litigation matters. Form No. 2 is to be used for hourly nonlitigation matters. Form No. 3 is to be used for contingency fee matters. A set of these forms may be downloaded from the California State Bar's website at <http://calbar.ca.gov>.

Notwithstanding Attorney's withdrawal or Client's notice of discharge, and without regard to the reasons for the withdrawal or discharge, Client will remain obligated to pay Attorney for all costs incurred prior to the termination and, in the event that there is any net recovery obtained by Client after conclusion of Attorney's services, Client remains obligated to pay Attorney for the reasonable value of all services rendered from the effective date of this Agreement to the date of discharge.

12. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges will immediately become due and payable. Attorney is authorized to use any funds held in Attorney's trust account as a deposit against costs to apply to such unpaid charges. After Attorney's services conclude, upon request, Client's file and property will be delivered to Client, or Client's other attorney, whether or not Client has paid any fees and/or costs owed to Attorney.

13. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs, or attorneys' fees, at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's own choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

(Client initials here) (Attorney initials here)

14. RECEIPT OF PROCEEDS. All proceeds of Client's case shall be deposited into Attorney's trust account for disbursement in accordance with the provisions of this Agreement.

15. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of this matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of this matter are expressions of opinion only. Client acknowledges that Attorney has made no promise or guarantees about the outcome.

16. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement or promise made on or before the effective date of this Agreement will be binding on the parties.

17. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

18. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may

the parties have agreed to binding arbitration and either party rejects the award and requests a trial de novo within 30 days after the award is mailed to the parties. If, after receiving a notice of client's right to arbitrate, Client does not elect to proceed under the State Bar fee arbitration procedures, and file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as provided in the previous paragraph A.

[Optional provision: If either party rejects a non-binding fee arbitration award by timely submission of a request for trial de novo, Attorney and Client agree that in lieu of a trial de novo in court, the trial after arbitration shall be binding arbitration pursuant to the provisions of paragraph 1, above.]

2. MEDIATION CLAUSE

If a dispute arises out of or relating to any aspect of this Agreement between Attorney and Client, or the breach thereof, and if the dispute cannot be settled through negotiation, Attorney and Client agree to first try in good faith to settle the dispute by private mediation or fee mediation provided by local bar association programs before resorting to arbitration, litigation, or any other dispute resolution procedure. The cost of such mediation shall be borne equally by the parties, unless otherwise stipulated in a settlement agreement between the parties.

3. INTEREST CHARGES

If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

[Interest may not be compounded without compliance with the California Civil Code, Appendix I, dealing with usury.]

4. REPLENISHING DEPOSIT

To commence the representation, Client has provided [must provide] Attorney with a \$_____ deposit. Attorney will hold the deposit in Attorney's trust account and apply it to each statement when rendered by Attorney. Client will pay any additional balance due upon receipt of Attorney's statements each month and also will replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement, in which event Client will be responsible for any amount due over and above the deposit or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

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18. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may

be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

19. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of the Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM, AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE JOINTLY AND SEVERALLY FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

STELLA KING

Address: _____

Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: _____

Linda H. Garcia, Partner

Other Clauses of Interest in Fee Agreements

1. ARBITRATION

A. ARBITRATION OF ALL DISPUTES INCLUDING CLAIMS OF MALPRACTICE

Any dispute between the parties [Attorney and Client] regarding the construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach, including, without limitation, claims for breach of contract, professional negligence, breach of fiduciary duty, misrepresentation, fraud and disputes regarding attorney fees and/or costs charged under this Agreement (except as provided in paragraph B below) shall be submitted to binding arbitration upon the written request of one party after the service of that request on the other party. The parties shall appoint one person [Option: or agree upon a 3-person panel] to hear and determine the dispute. [Option: name the arbitration provider such as AAA, JAMS, ADR, etc., and provide that the arbitration shall be conducted pursuant to the provider's rules]. If the parties cannot agree, then the Superior Court of [fill in the name of county] County shall choose an impartial arbitrator whose decision shall be final and conclusive on all parties. Attorney and Client shall each have the right of discovery in connection with any arbitration proceeding in accordance with Code of Civil Procedure Section 1283.05. [Optional provision: The cost of the arbitration, excluding legal fees and costs, shall be borne by the losing party or in such proportion as the arbitrator shall decide.] The parties shall bear their own legal fees and costs for [all claims, or contract claims, or tort claims]. The sole and exclusive venue for the arbitration and or any legal dispute shall be [fill in name of county] County, California.

By initialing below, Client and Attorney confirm that they have read and understand subparagraphs A above, and voluntarily agree to binding arbitration. In doing so, Client and Attorney voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. Client has the right to have an independent lawyer of Client's choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

_____ (Client Initial Here) _____ (Attorney Initial Here)

B. MANDATORY FEE ARBITRATION

Notwithstanding subparagraph A above, in any dispute over attorney's fees, costs or both subject to the jurisdiction of the State of California over attorney's fees, charges, costs or expenses, Client has the right to elect arbitration pursuant to the fee arbitration procedures as set forth in California Business and Professions Code Sections 6200 -6206. Arbitration pursuant to the Mandatory Fee Arbitration Act is non-binding unless the parties agree in writing, after the dispute has arisen, to be bound by the arbitration award. The Mandatory Fee Arbitration procedures permit a court trial after arbitration, or a subsequent binding contractual arbitration if

the parties have agreed to binding arbitration and either party rejects the award and requests a trial de novo within 30 days after the award is mailed to the parties. If, after receiving a notice of client's right to arbitrate, Client does not elect to proceed under the State Bar fee arbitration procedures, and file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as provided in the previous paragraph A.

[Optional provision: If either party rejects a non-binding fee arbitration award by timely submission of a request for trial de novo, Attorney and Client agree that in lieu of a trial de novo in court, the trial after arbitration shall be binding arbitration pursuant to the provisions of paragraph 1, above.]

2. MEDIATION CLAUSE

If a dispute arises out of or relating to any aspect of this Agreement between Attorney and Client, or the breach thereof, and if the dispute cannot be settled through negotiation, Attorney and Client agree to first try in good faith to settle the dispute by private mediation or fee mediation provided by local bar association programs before resorting to arbitration, litigation, or any other dispute resolution procedure. The cost of such mediation shall be borne equally by the parties, unless otherwise stipulated in a settlement agreement between the parties.

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[Interest may not be compounded without compliance with the California Civil Code, Appendix I, dealing with usury.]

4. REPLENISHING DEPOSIT

To commence the representation, Client has provided [must provide] Attorney with a \$_____ deposit. Attorney will hold the deposit in Attorney's trust account and apply it to each statement when rendered by Attorney. Client will pay any additional balance due upon receipt of Attorney's statements each month and also will replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement, in which event Client will be responsible for any amount due over and above the deposit or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

5. SECURITY DEPOSIT

Attorney's obligation to render services to Client will be subject to Attorney's receipt of a refundable security deposit of \$_____.

§3.2A C. Client Disclosure and Consent

Joint/Multiple Client Disclosure and Consent Form

Clients [NAME] and [NAME(s)] ("Joint Clients") have asked Attorney to jointly represent them in [DESCRIBE MATTER]. While joint representation may result in economic or tactical advantages, it also involves risks and potential conflicts of interest. The California Rules of Professional Conduct require that before an attorney may concurrently represent two or more clients in a matter, the attorney must: (1) inform each client in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the each client arising from the proposed joint representation, and (2) obtain the informed written consent of each client.

The purpose of this disclosure is to set forth potential conflicts of interest relating to the proposed joint representation, and what Attorney perceives to be the relevant circumstances and the actual and/or reasonably foreseeable adverse consequences. Assuming that both [OR ALL IF MORE THAN TWO CLIENTS] Clients provide their informed written consent, Attorney agrees to represent Joint Clients in [DESCRIBE MATTER]. Attorney understands that this arrangement is desired by Joint Clients as a means of securing the economic and tactical advantage of joint representation.

California law and Rule 3-310(C)(1) of the Rules of Professional Conduct require Attorneys to provide written disclosure of any actual and reasonably foreseeable adverse consequences arising from the proposed joint representation, and to obtain all clients' informed written consent to the joint representation. While Attorneys do not perceive any actual or reasonably foreseeable adverse consequences at this time, Clients should consider the following potential adverse consequences prior to consenting to the proposed joint representation:

- (1) When an attorney represents only one client, there is no concern regarding shared or divided loyalties; rather all of the attorney's efforts are focused on representing the interests of that one client. When an attorney represents two or more clients in the same matter, the attorney acts to protect the interests of each client, which may result in divided, or at least shared, attorney-client loyalties. Issues may arise as to which Attorney's representation of any one client may be limited by Attorney's representation of any other joint client. While neither Attorney nor Clients are aware of any such issues at this time, divided loyalty is always a risk in the event of joint representation.
- (2) Attorneys owe clients a duty to preserve secrets and confidential communications, unless that duty is excused by the State Bar Act, the Rules of Professional Conduct or other law. When an attorney represents more than one client in a matter, pursuant to Evidence Code §962 and California case, law there is no attorney-client privilege with respect to communications that take place between any of the Joint Clients and the attorney should any of the Joint Clients ever have a dispute in which those communications are relevant. Attorney has a duty to keep all of the Joint Clients reasonably informed of significant developments. Any information either of the Joint Clients discloses to Attorney during the course of the joint representation may be disclosed to the jointly represented clients during the course of the joint representation.
- (3) Conflicts may arise in particular with regard to: (a) litigation strategies that can impact different clients differently; and (b) settlement issues, inasmuch as Joint Clients may each have different ideas regarding the propriety of settlement. At this point, Attorney does not have sufficient information to evaluate whether a potential settlement presents a conflict between the Joint Clients' interests. If Attorney perceives there is a conflict with respect to a settlement demand or litigation strategy, there may be a need for Joint Clients to consult independent counsel.
- (4) Joint representation may also create an issue regarding custody, or control, of the original file when an attorney-client relationship ends. By signing this agreement, each of you agree that if Attorney stops representing one of you, but continues to represent the other(s), the client(s) represented by Attorney is entitled to maintain custody or control of the original file. The other party or parties is/are entitled to a copy of Client Papers as defined in Rule 3-700(D) of the Rules of Professional Conduct.

(5) In the event of a dispute or conflict between any of the Joint Clients, there is a risk that Attorney may be disqualified from representing one or more of the Joint Clients or that it may otherwise be inappropriate for Attorney to continue with the joint representation absent written consent from each of the Joint Clients.

Select one

(6) [FOR USE WHEN REPRESENTING MULTIPLE PLAINTIFFS]

If there is insufficient insurance or assets to cover the damages of each client, there may be disputes regarding how to allocate the insurance proceeds or assets between the Joint Clients.

or

(6) [FOR USE WHEN REPRESENTING MULTIPLE DEFENDANTS]

If there is a judgment against any of the Joint Clients which is not covered by insurance, that client may have rights of indemnity against one or more of the other parties. If any disputes should arise between the Joint Clients, Attorney will not advise or represent any of the clients in connection with any claim for contribution or indemnity that it may have against any of the other clients.

[OPTION RE PUNITIVE DAMAGES]

The complaint includes a claim for punitive damages, which presents the potential for a conflict inasmuch as an award of punitive damages is not insurable. Attorney will endeavor to keep each of the Joint Clients advised as to their potential risks and exposure with respect to the punitive damage claim, or with respect to any over policy limits claims should one ever be made.

Because there is currently no conflict of interest, Attorney may jointly represent Joint Clients in connection with the [DESCRIBE MATTER] provided that Joint Clients both/all give your informed consent in writing. Each Joint Client should feel free to consult with independent counsel before finalizing your decision to proceed with the joint representation, including whether or not to sign this conflict disclosure and waiver. Attorney emphasizes that each Joint Client remains free to seek independent counsel at any time even if they decide to sign this consent.

Notwithstanding the foregoing, it is Attorney's current understanding that each of the Joint Clients desires to have Attorney jointly represent them in the [DESCRIBE MATTER]. By signing this Disclosure and Consent, each client expressly acknowledges that he/she or it (acting through its authorized representative): (1) has carefully read and fully understands the disclosures set forth above; (2) has carefully considered all of the circumstances and potential conflicts described above; (3) has had the opportunity to consult with independent counsel regarding the disclosures and consent in this agreement; and (4) agrees to the joint representation by Attorney of Clients in [DESCRIBE MATTER].

Dated: _____ CLIENT: _____

Dated: _____ CLIENT: _____

Dated: _____ ATTORNEY: _____

July 24, 2015

Comment: This sample form is available from the California State Bar, on pages 9–10 of the “Optional clauses and disclosure forms.” See <http://www.calbar.ca.gov/Attorneys/Forms.aspx>.

If defense counsel represents defendants in the same matter where there may be a conflict, counsel must notify the court of the conflict, even if only

potential, and obtain a knowing and intelligent waiver from each client. *People v Bonin* (1989) 47 C3d 808, 836; *People v Mroczko* (1983) 35 C3d 86, 112. Counsel may modify and use this sample form to obtain a waiver and ensure that the co-defendants have given that informed written consent. See Cal Rules of Prof Cond 3–310 (effective November 1, 2018, conflict of interest will be covered in Rule 1.7(a)-(e)).

Cross-Reference: For the procedural steps to follow to ensure a knowing and intelligent waiver, see California Criminal Law Procedure and Practice §2.9 (Cal CEB).

§3.3 D. Letter Notifying Defense Counsel of Substitution of Counsel, and for Release of Information

SUBSTITUTION OF COUNSEL

TO: My former attorney, __[name]__

FROM: __[Name of client]__

This RELEASE relates solely to Court Docket No(s). _____

My NEW ATTORNEY is: __[name]__

I authorize and instruct you to turn over to my NEW ATTORNEY, named above, all discovery and pleadings in the __[case/cases]__ identified above __[including the police and other official reports, together with any transcripts, and other court documents therein]__.

I also authorize and instruct you to permit my NEW ATTORNEY to inspect and copy all reports, transcripts, or recordings of any witnesses interviewed by employees of __[name of former attorney]__ in the __[case/cases]__ identified above.

To the extent necessary to accomplish these instructions, I release you from the attorney/ client privilege.

I have read the above release and have signed my authorization below at the date and place indicated.

Date: _____ **_____[Signature of client]_____**

Location: _____ **_____[Typed name]_____**

Witnessed by:

____[Signature of witness]____

____[Typed name]____

Comment: A criminal defendant has the right to discharge *retained* counsel and substitute a new attorney with or without cause, if the substitution is timely and it does not result in significant prejudice to the defendant. See *People v Ortiz* (1990) 51 C3d 975, 983. To discharge appointed counsel and substitute another appointed attorney, an indigent defendant must show either that counsel is providing inadequate representation or that there is an irreconcilable conflict between attorney and client. See *People v Marsden* (1970) 2 C3d 118.

Under Cal Rules of Prof Cond 3-700(D)(1), an attorney whose employment has terminated must release all client papers and property to the client, at the client's request. (Termination of employment will be covered in Rule 1.16, effective November 1, 2018.)

Cross-Reference: See California Criminal Law Procedure and Practice §§3.24-3.29 (Cal CEB).

§3.4

D. Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210)

MC-210																	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS MAILING ADDRESS CITY AND ZIP CODE BRANCH NAME	FOR COURT USE ONLY																
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:																	
DEFENDANT'S FINANCIAL STATEMENT AND NOTICE TO DEFENDANT <i>(check all that apply)</i> <input type="checkbox"/> ELIGIBILITY FOR APPOINTMENT OF COUNSEL <input type="checkbox"/> REIMBURSEMENT FOR COST OF COURT-APPOINTED COUNSEL <input type="checkbox"/> ELIGIBILITY FOR RECORD ON APPEAL AT PUBLIC EXPENSE																	
<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> 1. a. Defendant's name: _____ b. Other names used: _____ c. Address: _____ 2. Defendant's present employment: a. Occupation: _____ b. Name of employer: _____ c. Address: _____ d. Gross pay per month: \$ _____ week: \$ _____ day: \$ _____ e. Take-home pay per month: \$ _____ week: \$ _____ day: \$ _____ f. Name of union: _____ g. Name of credit union: _____ 3. <i>If defendant is not now working, state the name and address of defendant's last employer and the last date defendant was employed.</i> a. Name: _____ b. Address: _____ c. Last date of employment: _____ 4. Defendant <input type="checkbox"/> is <input type="checkbox"/> is not married. 5. a. Spouse's name: _____ d. Date of birth: _____ b. Other names used: _____ e. Telephone number: _____ c. Address: _____ f. Driver's license number: _____ 6. Spouse's present employment: a. Occupation: _____ b. Name of employer: _____ c. Address: _____ d. Gross pay per month: \$ _____ week: \$ _____ day: \$ _____ e. Take-home pay per month: \$ _____ week: \$ _____ day: \$ _____ f. Name of union: _____ g. Name of credit union: _____ 7. <i>If spouse is not now working, state the name and address of spouse's last employer and the last date spouse was employed.</i> a. Name: _____ b. Address: _____ c. Last date of employment: _____ 8. Dependents </div> <div style="width: 35%; text-align: center;"> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; border-bottom: 1px solid black;">Name</th> <th style="text-align: left; border-bottom: 1px solid black;">Address</th> <th style="text-align: left; border-bottom: 1px solid black;">Relationship</th> <th style="text-align: left; border-bottom: 1px solid black;">Age</th> </tr> </thead> <tbody> <tr><td style="height: 15px;"> </td><td> </td><td> </td><td> </td></tr> <tr><td style="height: 15px;"> </td><td> </td><td> </td><td> </td></tr> <tr><td style="height: 15px;"> </td><td> </td><td> </td><td> </td></tr> </tbody> </table> </div> </div>		Name	Address	Relationship	Age												
Name	Address	Relationship	Age														

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:		MC-210 CASE NUMBER																				
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <p>9. Defendant</p> <p>a. Unemployment and disability \$ _____</p> <p>b. Social Security \$ _____</p> <p>c. Welfare, TANF \$ _____</p> <p>d. Veteran's benefits \$ _____</p> <p>e. Worker's compensation \$ _____</p> <p>f. Child support payments \$ _____</p> <p>g. Spousal support payments \$ _____</p> <p>h. All other income not elsewhere listed ... \$ _____</p> <p style="text-align: right;">Total: \$ _____</p> </div> <div style="width: 45%;"> <p>OTHER MONTHLY INCOME</p> <p>Spouse</p> <p>a. Unemployment and disability \$ _____</p> <p>b. Social Security \$ _____</p> <p>c. Welfare, TANF \$ _____</p> <p>d. Veteran's benefits \$ _____</p> <p>e. Worker's compensation \$ _____</p> <p>f. Child support payments \$ _____</p> <p>g. Spousal support payments \$ _____</p> <p>h. All other income not elsewhere listed ... \$ _____</p> <p style="text-align: right;">Total: \$ _____</p> </div> </div>																						
<p style="text-align: center;">EXPENSES</p> <p>10. Monthly expenses being paid by defendant alone or by defendant and spouse</p> <table style="width: 100%;"> <tr> <td style="width: 50%;"> <p>a. Rent or house payments \$ _____</p> <p>b. Car payments \$ _____</p> <p>c. Transportation payments \$ _____</p> <p>d. Medical and dental payments \$ _____</p> <p>e. Loan payments \$ _____</p> </td> <td style="width: 50%;"> <p>f. Clothing and laundry \$ _____</p> <p>g. Food \$ _____</p> <p>h. Support payments \$ _____</p> <p>i. Insurance payments \$ _____</p> <p>j. Other payments (union, taxes, utilities) ... \$ _____</p> </td> </tr> </table> <p style="text-align: right;">Total (a-j): \$ _____</p> <p>11. Installment payments other than those listed in item 10.</p> <table style="width: 100%;"> <thead> <tr> <th style="text-align: left;">Name of Creditor</th> <th style="text-align: left;">Monthly Payment</th> <th style="text-align: left;">Balance Owed</th> </tr> </thead> <tbody> <tr><td>a. _____</td><td>\$ _____</td><td>\$ _____</td></tr> <tr><td>b. _____</td><td>\$ _____</td><td>\$ _____</td></tr> <tr><td>c. _____</td><td>\$ _____</td><td>\$ _____</td></tr> <tr><td>d. _____</td><td>\$ _____</td><td>\$ _____</td></tr> <tr><td>e. _____</td><td>\$ _____</td><td>\$ _____</td></tr> </tbody> </table> <p style="text-align: right;">Total: \$ _____</p>			<p>a. Rent or house payments \$ _____</p> <p>b. Car payments \$ _____</p> <p>c. Transportation payments \$ _____</p> <p>d. Medical and dental payments \$ _____</p> <p>e. Loan payments \$ _____</p>	<p>f. Clothing and laundry \$ _____</p> <p>g. Food \$ _____</p> <p>h. Support payments \$ _____</p> <p>i. Insurance payments \$ _____</p> <p>j. Other payments (union, taxes, utilities) ... \$ _____</p>	Name of Creditor	Monthly Payment	Balance Owed	a. _____	\$ _____	\$ _____	b. _____	\$ _____	\$ _____	c. _____	\$ _____	\$ _____	d. _____	\$ _____	\$ _____	e. _____	\$ _____	\$ _____
<p>a. Rent or house payments \$ _____</p> <p>b. Car payments \$ _____</p> <p>c. Transportation payments \$ _____</p> <p>d. Medical and dental payments \$ _____</p> <p>e. Loan payments \$ _____</p>	<p>f. Clothing and laundry \$ _____</p> <p>g. Food \$ _____</p> <p>h. Support payments \$ _____</p> <p>i. Insurance payments \$ _____</p> <p>j. Other payments (union, taxes, utilities) ... \$ _____</p>																					
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c. _____	\$ _____	\$ _____																				
d. _____	\$ _____	\$ _____																				
e. _____	\$ _____	\$ _____																				
<p style="text-align: center;">ASSETS</p> <p>12. What do you own? (State value):</p> <table style="width: 100%;"> <tr> <td style="width: 50%;"> <p>a. Cash \$ _____</p> <p>b. House equity \$ _____</p> <p>c. Cars, other vehicles and boat equity (List make, year, and license number of each) \$ _____</p> <p>d. Checking, savings, and credit union accounts (List name and account number of each) \$ _____</p> <p>e. Other real estate equity \$ _____</p> <p>f. Income tax refunds due \$ _____</p> <p>g. Life insurance policies (ordinary life, face value) \$ _____</p> <p>h. Other personal property (jewelry, furniture, furs, stocks and bonds, etc.) \$ _____</p> </td> <td style="width: 50%;"> <p style="text-align: right;">Length of ownership _____</p> <p style="text-align: right;">Total: \$ _____</p> </td> </tr> </table>			<p>a. Cash \$ _____</p> <p>b. House equity \$ _____</p> <p>c. Cars, other vehicles and boat equity (List make, year, and license number of each) \$ _____</p> <p>d. Checking, savings, and credit union accounts (List name and account number of each) \$ _____</p> <p>e. Other real estate equity \$ _____</p> <p>f. Income tax refunds due \$ _____</p> <p>g. Life insurance policies (ordinary life, face value) \$ _____</p> <p>h. Other personal property (jewelry, furniture, furs, stocks and bonds, etc.) \$ _____</p>	<p style="text-align: right;">Length of ownership _____</p> <p style="text-align: right;">Total: \$ _____</p>																		
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<p>13. ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND NOTICE TO DEFENDANT: If an attorney is appointed to represent you, the court will, at the conclusion of the criminal proceedings, after a hearing, make a determination of your ability to pay all or a portion of the cost of the attorney. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such an order will have the same force and effect as a judgment in a civil action and will be subject to execution.</p> <p style="text-align: center;">Declaration of Defendant</p> <p>I declare under penalty of perjury that the foregoing is true and correct, and that I understand the notice contained in item 13, under the laws of the state of California.</p> <p>Date: _____</p> <p style="text-align: right;">_____ (Signature of Defendant)</p>																						
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="font-size: small;">MC-210 [Rev. January 1, 2009]</div> <div style="text-align: center;"> <p>DEFENDANT'S FINANCIAL STATEMENT ON ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND REIMBURSEMENT AND RECORD ON APPEAL AT PUBLIC EXPENSE</p> </div> <div style="text-align: right;"> <p>CEB</p> <p style="font-size: x-small;">Page 2 of 2</p> </div> </div>																						

Comment: An indigent defendant charged with an offense that can result in a loss of liberty is entitled to appointment of counsel. *Tracy v Municipal Court* (1978) 22 C3d 760, 766; *Mills v Municipal Court* (1973) 10 C3d 288, 301.

A defendant requesting appointed counsel must disclose his or her assets and liabilities under penalty of perjury. Although use of this form is

not mandatory, a defendant requesting appointment of counsel should provide all the information requested by the form.

Cross-Reference: For further discussion of the right of indigent defendants to appointment of counsel, see California Criminal Law Procedure and Practice §§3.2–3.6 (Cal CEB).

§3.5 F. Motion to Remove Defense Counsel

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO __[NAME]__, DEFENDANT IN THE ABOVE-ENTITLED ACTION; BY AND THROUGH __[HIS/HER]__ ATTORNEY, __[NAME]__:

PLEASE TAKE NOTICE that, on __[date]__, at __[time]__, in Department __[number]__ of the above-entitled Court, or as soon thereafter as the matter can be heard, the People of the State of California will move the Court to remove attorney, __[name]__, as attorney for defendant, __[name]__, due to a conflict of interest.

This motion will be based on the attached declaration, supporting memorandum, and oral argument presented at the time of the motion.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[Integrate facts of case that support removing defense counsel with law, as in the following example based on defense counsel having represented the codefendant at the preliminary hearing.]

I.

Once defense attorney, __[name]__, decided to represent defendant, __[name]__, after previously representing codefendant, __[name]__, __[he/she]__ placed himself in a position of obvious conflict with, and undue advantage over, codefendant due to their previous confidential attorney-client relationship and information obtained therein, possibly detrimental to codefendant, which counsel might use to argue against the interest of __[his/her]__ former client at trial, plea negotiations, or sentencing. (*Leversen v Superior Court* (1983) 34 C3d 530; *Dill v Superior Court* (1984) 158 CA3d 301.) In *Dill*, a civil litigant sought an order disqualifying the law firm representing his adversary, Cook, on the basis that Dill's former attorney had joined the law firm representing Cook. The trial court denied the motion, but the Court of Appeal reversed and compelled the disqualification. The Court of Appeal ruled that, when an attorney had "former personal involvement" in the "identical action," such attorney was disqualified from representing any interest adverse to his former client, pursuant to (former) Rule 4-101 of the Rules of Professional Conduct. (*Dill v Superior Court*, *supra*, 158 CA3d at 306.) The Court also ruled that proof of the attorney's reception of confidential information was not required "when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney...." (*Dill v Superior Court*, *supra*, 158 CA3d at 304, quoting *Global Van Lines, Inc. v Superior Court* (1983) 144 CA3d 483, 489.)

II.

Therefore, counsel in defense attorney's position has an ethical and legal obligation to withdraw from this case. If he fails to do so, he may be removed from the case even at the expense of depriving defendant of his choice of counsel in order to assure codefendant a fair trial. (*Leversen v Superior Court*, *supra*; *Dill v Superior Court*, *supra*; *Yorn v Superior Court* (1979) 90 CA3d 669.) In *Yorn*, a codefendant in a criminal case filed a pretrial motion to disqualify the other codefendant's privately retained counsel on grounds of a prior attorney-client relationship between the attorney and Mr. Yorn and for conflict of interest. The attorney had represented Mr. Yorn earlier in the case, and confidential information had been communicated. Mr. Yorn's motion was granted and the court's decision was affirmed on appeal.

CONCLUSION

For the foregoing reasons, the People respectfully request the above Court to remove __[name]__ as attorney for defendant, based on the ground of conflict of interest, and appoint substitute counsel pursuant to Penal Code section 987.2, or allow defendant a reasonable time to obtain new retained counsel if he is otherwise able to so do.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

DECLARATION OF __[NAME]__

I, __[name]__, declare:

1. That I am a Deputy District Attorney licensed to practice law in the State of California.

2. That I represent the People of the State of California, Plaintiff, in the above-entitled action.

3. __[State facts that support removing defense counsel, e.g., that defense counsel represented the codefendant at the preliminary hearing in the same matter.]__

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

Respectfully submitted,

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

Comment: The court may remove an appointed attorney because of a conflict even if the defendant consents to the conflict. See *People v Noriega* (2010) 48 C4th 517, 520; *People v Jones* (2004) 33 C4th 234, 240. Another possible ground for removal of counsel would be counsel's inability to proceed in a timely fashion. *People v Avila* (2009) 46 C4th 680, 690; *People v McKenzie* (1983) 34 C3d 616, 630.

Cross-Reference: See Crim Law §3.28. See also Crim Law §§2.8–2.16.

§3.6 G. Defense Motion to Be Relieved as Counsel

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111.]

TO THE ABOVE-ENTITLED COURT AND TO __[NAME OF DEFENDANT]__:

PLEASE TAKE NOTICE that __[name of withdrawing attorney]__ moves the Court under Code of Civil Procedure section 284(2) for an order permitting __[him/her]__ to be relieved as attorney for defendant, __[name]__, in this action. The grounds for issuance of this order are __[specify grounds]__.

The Court is located at __[address]__.

This motion is based on the attached documents and exhibits including __[specify by title (or nature) and date, e.g., the declaration of name]__ on __[date]__, __[and]__ on all papers filed in this action __[and on any evidence received at the hearing]__.

Date: _____

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

MEMORANDUM IN SUPPORT OF MOTION TO BE RELIEVED AS DEFENSE COUNSEL

[Use if you are retained and the defendant has not paid your fee.]

Defense attorneys may be relieved from representing a criminal defendant when the defendant has failed to pay the agreed-on fee. (*People v Castillo* (1991) 233 CA3d 36, 55.) __ *[Add facts from your case concerning nonpayment of fee and further case law.]* __

[Use if there is a conflict.]

There is a conflict in the present case. See the attached declaration of defense counsel. Because it is essential that the attorney-client privilege be protected, defense counsel's good faith assertion of a conflict of interest __ *[with a third person]* __ **is sufficient basis for a motion to be relieved, without requiring details. (*Leversen v Superior Court* (1983) 34 C3d 530; *Aceves v Superior Court* (1996) 51 CA4th 584, 592; *Uhl v Municipal Court* (1974) 37 CA3d 526.)** __ *[Add additional information and case law if desired.]* __

[Use if you are the public defender and are requesting to be relieved because of financial ineligibility.]

The Public Defender of _____ **County is authorized to represent individuals who are** __ *[use language of authorization, e.g., "not financially able to employ counsel" under section 27 of the Alameda County Charter]* __.

Defendant, __ *[name]* __, **was in custody when the Public Defender began representing** __ *[him/her]* __, **but is now out of custody and is financially able to employ counsel because** __ *[state why, e.g., he or she has full-time employment, an automobile, and a savings account]* __.

[Use if defendant wants to represent himself or herself.]

A criminal defendant has the right to waive counsel and represent himself or herself. (*Faretta v California* (1975) 422 US 806, 835, 95 S Ct 2525; *Martinez v Court of Appeal* (2000) 528 US 152, 154, 120 S Ct 684; *People v Taylor* (2009) 47 C4th 850, 878 (right to self-representation

does not extend to direct appeal of criminal conviction).) __[Add relevant facts and additional case law.]__

[Use if you want to join in a defendant's Marsden motion.]

When a defendant's right to counsel would be substantially impaired by continuing with the present attorney, the trial court may discharge the attorney and substitute new counsel. (*People v Marsden* (1970) 2 C3d 118, 123.) The substantial impairment in this case is __[specify]___. __[Add relevant facts and additional case law.]__

[Continue]

Therefore, __[the Office of the Public Defender/defense counsel]__ must move to be relieved as attorney of record.

Date: _____

Respectfully submitted,
 __[Signature of attorney]__
 __[Typed name]__
 __[Title if in public defender office]__
 Attorney for __[name of defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.
 See §1.9; Crim Law §18.5.]

**DECLARATION OF __[NAME OF ATTORNEY]__
 SUPPORTING __[HIS/HER]__ MOTION TO BE RELIEVED
 AS ATTORNEY FOR DEFENDANT, __[NAME]__**

I, __[name]__, declare:

1. I am the attorney for __[name of defendant]__ in this action.
2. __[State reason for request to be relieved; see Comment, below.]__
3. __[State reason for making motion to be relieved instead of filing a substitution of attorneys; see Comment, below.]__
4. No injury to defendant will result from my being relieved as counsel because __[give reason]__.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____**Attorney for** _____[name of
defendant]____

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff,**

vs

_____[Name(s)]____,
Defendant(s)

Dept. _____[number]____

No. _____[case number]____

**[PROPOSED] ORDER
GRANTING ATTORNEY'S
MOTION TO BE RELIEVED AS
COUNSEL FOR DEFENDANT,
_____[NAME]____**

The motion of _____[name of outgoing attorney]____, **attorney for defendant,** _____[name]____, **to be relieved was regularly heard at the above date and time. Appearing as attorneys were:** _____[List names of defense attorney, prosecutor, and any co-counsel]____.

IT IS ORDERED that:

1. _____[Name of outgoing attorney]____ **be relieved as attorney for defendant.**

2. _____[State any additional orders, e.g., allowing defendant to proceed in pro per, or appointing new defense counsel]____.

Date: _____

_____[Signature of Judge]____

_____[Typed name]____

Judge of the Superior Court

Comment: An attorney seeking to withdraw as counsel for a defendant may not do so without permission of the court. Defense counsel seeking to withdraw from a case must take reasonable steps to avoid prejudicing the

defendant's rights, including giving notice to the client, allowing time for the employment of other counsel, and delivering papers and property to the client or the new attorney. Cal Rules of Prof Cond 3-700(A)(2), (D). (Termination of employment will be covered in Rule 1.16, effective November 1, 2018.)

A motion to be relieved as counsel must be served on the defendant (see CCP §284(2)), the prosecutor, and co-counsel. Withdrawal is effective only when written notice is given to the "adverse party." CCP §285; *People v Bouchard* (1957) 49 C2d 438, 441.

This motion includes a proposed order. If the court grants the motion, written copies of the court's order must be served on the former client and other parties in the action. CCP §§284-285; Cal Rules of Ct 3.1362(d)-(e).

If the reason for the request to be relieved is a conflict of interest, and the nature of the conflict is not apparent from the circumstances, counsel should consider including some general information about the nature of the conflict in the declaration accompanying the motion. See *Manfredi & Levine v Superior Court* (1998) 66 CA4th 1128 (trial court's denial of counsel's motion to be relieved not abuse of discretion when counsel refused to answer any questions about nature of conflict and trial court had reason to doubt counsel's good faith). If the trial court wants further information about the nature of the conflict, counsel should request a hearing in chambers. See 66 CA4th at 1136. Counsel should exercise care to avoid disclosing any privileged information.

When this motion is brought by retained counsel, the procedures for discharge, withdrawal, and substitution of counsel are the same in criminal proceedings as in civil proceedings. *People v Bouchard, supra*. See CCP §§284-285 (civil and criminal); Cal Rules of Ct 3.1362 (civil). In civil cases, the use of forms Notice of Motion and Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-051) and Declaration in Support of Attorney's Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-052) is mandatory. Cal Rules of Ct 3.1362(a), (c). A supporting memorandum is not required. Cal Rules of Ct 3.1362(b). An attorney unfamiliar with the practices in the court in which the motion to be relieved is filed should check the local rules and check with the court clerk about whether the court expects counsel to use the Judicial Council forms in criminal matters.

The declaration must state in general terms, without compromising the confidentiality of the attorney-client relationship, why the declarant is making a motion to be relieved instead of filing a substitution of attorneys.

See Cal Rules of Ct 3.1362(c). If the notice of motion will be served on the client by mail, the declaration must include additional statements concerning the client's current or last known address. Similarly, if served electronically, the notice must be accompanied by a declaration stating that the electronic service address is the client's current electronic service address. See Cal Rules of Ct 3.1362(d).

The prosecution must consider the effect of defense counsel's withdrawal on the defendant's and the prosecution's speedy trial rights and may want to oppose the motion if the trial date has already been set, particularly if no conflict is involved. See *People v Murphy* (1973) 35 CA3d 905, 921. The prosecution will probably want to have defense counsel or the court obtain a time waiver from the defendant.

Cross-Reference: See Crim Law §3.24 (retained counsel), §§3.25–3.28 (appointed counsel; *Marsden* motions), §§3.7–3.11 (defendant's right to self-representation).

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Arrest and Bench Warrants; Summons; Subpoenas

I. OVERVIEW

- A. Order to Attend Court or Provide Documents:**
Subpoena/Subpoena Duces Tecum (Criminal and Juvenile)
(Judicial Council Form CR-125/JV-525) **§4.1**
- B. Motion to Quash Subpoena (Duces Tecum) **§4.2****

I. OVERVIEW

§4.1

A. Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile) (Judicial Council Form CR-125/JV-525)

CR-125/JV-525 ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address)		FOR COURT USE ONLY	
TELEPHONE NO. _____ FAX NO. (OPTIONAL) _____ EMAIL ADDRESS (OPTIONAL) _____ ATTORNEY'S NAME _____			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS _____ MAILING ADDRESS _____ CITY AND ZIP CODE _____ BRANCH NAME _____			
CASE NAME: _____			
ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS: Subpoena/Subpoena Duces Tecum		CASE NUMBER _____	

You must attend court or provide to the court the documents listed below. Follow the orders checked in item 2 below. If you do not, the judge can fine you, send you to jail, or issue a warrant for your arrest.

1. To: (name or business) _____
2. You must follow the court order(s) checked below:
 - a. ☐ Attend the hearing.
 - b. ☐ Attend the hearing and bring all items checked in c. below.
 - c. ☐ Provide a copy of these items to the court (Do not use this form to obtain Juvenile Court records):
 - (1) _____
 - (2) _____
 - (3) _____
 - ☐ If this box is checked, provide all items listed on the attached sheet labeled "Provide These Items."
 - d. ☐ If someone else is responsible for maintaining the items checked in c. above, that person (the Custodian of Records) must also attend the hearing.
 - e. ☐ If this box is checked and you deliver all items listed above to the court within 5 days of service of this order, you do not have to attend court if you follow the instructions in item 5.

3.

Court Hearing Date: _____ The court hearing will be at (name and address of court): _____	
Date: _____ Time: _____	
Dept.: _____ Rm.: _____	

Call the person listed in item 4 below to make sure the hearing date has not changed. If you cannot go to court on this date, you must get permission from the person in item 4. You may be entitled to witness fees, mileage, or both, in the discretion of the court. Ask the person in item 4 after your appearance.
4. The person who has required you to attend court or provide documents is:

Name: _____ Phone No.: _____	
Address: _____	
Number, Street, Apt. No.: _____	
City: _____	State: _____ Zip: _____
Date: _____	Signature: _____
Name and Title: _____	

FOR COURT USE ONLY

CASE NAME: _____	CR-125/JV-525 CASE NUMBER _____
------------------	------------------------------------

- 5 a. Put all items checked in item 2c and your completed *Declaration of Custodian of Records* form in an envelope. (You can ask the person in item 4 where to get this form.) Attach a copy of page 1 of this order to the envelope.
- b. Put the envelope inside another envelope. Then, attach a copy of page 1 of this form to the outer envelope or write this information on the outer envelope:
- (1) Case name
 - (2) Case number
 - (3) Your name
 - (4) Hearing date, time, and department
- c. Seal and mail the envelope to the Court Clerk at the address listed in ☐ item 3 or ☐ The court address in the caption on page 1. You must mail these documents to the court within five days of service of this order.
- d. If you are the Custodian of Records, you must also mail the person in item 4 a copy of your completed *Declaration of Custodian of Records*. Do not include a copy of the documents.

— The server fills out the section below. —

Proof of Service of CR-125/JV-525

1. I personally served a copy of this subpoena on:
 Date: _____ Time: _____ ☐ a.m. ☐ p.m.
 Name of the person served: _____
 At this address: _____
 After I served this person, I mailed or delivered a copy of this Proof of Service to the person in item 4 on (date): _____
 Mailed from (city): _____
2. I received this order for service on (date): _____ and was not able to serve (name of person) _____ after (number of attempts) _____ attempts because:
 - a. ☐ The person is not known at this address.
 - b. ☐ The person moved and the forwarding address is not known.
 - c. ☐ There is no such address.
 - d. ☐ The address is in a different county.
 - e. ☐ I was not able to serve by the hearing date.
 - f. ☐ Other (explain): _____
3. Server's name: _____ Phone no. _____
4. The server (check one)

a. <input type="checkbox"/> is a registered process server. b. <input type="checkbox"/> is not a registered process server. c. <input type="checkbox"/> is a sheriff, marshal, or constable.	d. <input type="checkbox"/> works for a registered process server. e. <input type="checkbox"/> is exempt from registration under Business and Professional Code section 22350(b).
--	--
5. Server's address: _____
 If server is a registered process server:
 County of registration: _____ Registration no.: _____

I declare under penalty of perjury under the laws of the State of California that I am at least 18 years old and not involved in this case and the information above is true and correct.

Date: _____

TYPE OR PRINT NAME OF SERVER	SIGNATURE OF SERVER
------------------------------	---------------------

CR-125/JV-525 (Rev. July 1, 2007)

ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS:
 Subpoena/Subpoena Duces Tecum
 (Criminal and Juvenile)



Page 2 of 2

Comment: Use of this Judicial Council form is mandatory. Cal Rules of Ct 1.31. It may be used as either a subpoena for a witness or as a subpoena duces tecum for production of documents. When used as a subpoena duces tecum, check the appropriate box under item 2, list the items requested, and, if necessary, attach an affidavit describing the records to be produced.

Personal service of a subpoena is not required. The subpoena may also be sent by mail or messenger, but in this case, service is not complete until the witness acknowledges receipt by telephone, mail, over the Internet by e-mail or completion of the sender's online form, or in person, and identifies himself or herself by reference to his or her date of birth and his or her driver's license number or DMV identification card number. See Pen C §1328d. A subpoena should be served in time to permit the witness a reasonable time for preparation and travel. CCP §1987(a).

A subpoena may not be filed unless it is relevant to the determination of an issue in a law and motion proceeding or other hearing, or the judge orders it filed for good cause. Cal Rules of Ct 3.250(a). Counsel must keep copies of the subpoena and the return of service as part of the record in the case; if served electronically, proof of service must meet the requirements in Cal Rules of Ct 2.251(j). Cal Rules of Ct 3.250(b).

Cross-Reference: On subpoenas in criminal cases, see Pen C §§1326–1332. For discussion of subpoenas, see California Criminal Law Procedure and Practice §§4.28–4.36 (Cal CEB).

§4.2 B. Motion to Quash Subpoena (Duces Tecum)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. For discussion, see §§1.4–1.10. See sample first page in §1.12.]

TO THE ABOVE-ENTITLED COURT, AND TO __[THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT, AND DEFENSE COUNSEL]__:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, __[name of party who is being subpoenaed, or whose records are being subpoenaed]__ will move the Court for an order

(a) Quashing the subpoena __[duces tecum]__ served on __[name]__ on __[give date of service]__; and

(b) Awarding reasonable attorney fees and expenses incurred in making this motion.

The motion to quash is made under Code of Civil Procedure section 1987.1 on the ground that the subpoena __[duces tecum]__ is invalid and defective in that __[state basis for motion to quash, e.g., ser-

vice not timely, insufficient description, privilege, discovery should be pursued under Pen C §§1054–1054.7]__.

The motion for reasonable attorney fees and expenses is made under Code of Civil Procedure section 1987.2(a) on the ground that the motion to quash was opposed in bad faith or without substantial justification or that one or more of the subpoena's requirements was oppressive.

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, __[the attached declaration(s), the attached exhibit(s)]__, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

THIS COURT HAS AUTHORITY TO QUASH THIS SUBPOENA DUCES TECUM

The trial court may make an order quashing a subpoena duces tecum on a showing of good cause for nonproduction. (Code of Civil Procedure section 1987.1.) __[Make such arguments as apply to your case, e.g., subpoena not served within required time frame, materials to be brought not specified, privilege. Give each argument its own heading.]__

THIS COURT HAS AUTHORITY TO AWARD REASONABLE ATTORNEY FEES AND EXPENSES

The trial court in its discretion may award the amount of reasonable expenses, including attorney fees, incurred in making or oppos-

ing the motion to quash if the motion was made or opposed in bad faith or without substantial justification or one or more of the subpoena's requirements was oppressive. (Code of Civil Procedure section 1987.2(a).) __[Make applicable arguments.]__

CONCLUSION

For these reasons, the Court should quash the subpoena duces tecum issued on __[date]__ to __[name]__ by the __[prosecution/defense]__.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public office]__

Attorney for __[name of defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

DECLARATION OF __[NAME]__ IN SUPPORT OF MOTION TO QUASH

I, __[name]__, declare:

1. I am __[e.g., the attorney for the defendant]__ in this action.

2. On __[date]__, __[name]__ caused a subpoena __[duces tecum]__ to be served on __[name of witness served]__, requiring __[him/her]__ to appear at the trial of this matter in Department __[number]__ located at __[address]__, at __[time]__, on __[date]__, and to produce the documents and things described therein. A copy of the subpoena __[duces tecum]__ is attached to this declaration as Exhibit __[number or letter; see §1.25]__, and incorporated herein by reference.

3. __[Give facts showing grounds for motion to quash, e.g., service not timely, insufficient description, privilege, discovery should be sought instead under Pen C §§1054–1054.7]__.

4. __[If attorney fees are being claimed, give facts showing that opposition to motion will be in bad faith or without substantial justification, or that one or more of the subpoena's requirements was oppressive]__.

5. For these reasons, I ask that the Court issue its order quashing the subpoena __[duces tecum]__ and __[awarding reasonable attorney fees incurred in making this motion]__.

6. I have incurred the following expenses in making this motion: __[List expenses]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[Signature of declarant]__

__[Typed name]__

__[Title of declarant if in public office]__

Comment: A motion to quash a subpoena is usually made by the witness on whom the subpoena was served or, in the case of a subpoena duces tecum, by the subject of the records sought.

Cross-Reference: For discussion of moving to quash a subpoena, see Crim Law §§4.32–4.34.

1. The first part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

2. The second part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

3. The third part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

4. The fourth part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

5. The fifth part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

6. The sixth part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

7. The seventh part of the document is a list of the names of the persons who have been appointed to the various committees of the Board of Directors.

Release Procedures

I. OVERVIEW

- A. Motion to Increase Bail §5.1
- B. Motion to Set or Reduce Bail §5.2
- C. Motion to Examine Source of Bail §5.3

I. OVERVIEW

§5.1 A. Motion to Increase Bail

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on __[date]__, at __[time]__, in Department __[number]__ of the above-entitled court, or as soon thereafter as the matter may be heard, the People will move the Court for an order increasing the bail from the present amount of __[dollar amount]__ to the increased amount of __[dollar amount]__.

This motion will be based on the attached supporting memorandum and declaration, __[list any other attached documents, e.g., a police report or pages from the preliminary hearing transcript]__, all court documents in this case, and evidence and argument presented at the hearing on this motion.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

Public safety is the primary factor for the court to consider in setting bail. (Cal Const art I, §12; Pen C §1275; *Gray v Superior Court* (2005) 125 CA4th 629, 642.) Other factors to consider include the following (Cal Const art I, §12; Pen C §1275):

- 1. The protection of the public;**
- 2. The seriousness of the offense charged;**
- 3. The previous criminal record of the defendant; and**
- 4. The probability of defendant appearing.**

These factors are not exclusive. *In re Alberto* (2002) 102 CA4th 421, 430.

__ [Integrate facts of case and your bail request into above and other relevant law] __.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[Each declaration should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

**DECLARATION IN SUPPORT OF MOTION TO INCREASE
BAIL IN CASE NO. _____**

1. I, __[name]__, am a deputy district attorney for the County of _____ and am presently assigned to the case of People v __[name of defendant]__, Case No. _____.

2. I declare on information and belief that the following facts are true. Each statement of fact is based on __[state what, e.g., the preliminary hearing transcript, the pleadings, interviews with the investigating officer, interviews with civilian witnesses in the case, and the police reports in this case]__.

3. __[Set forth in this and subsequent numbered paragraphs the facts relevant to the motion]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

Respectfully submitted,
__[Name of District Attorney]__
District Attorney
__[Signature of deputy district attorney]__
__[Typed name]__
Deputy District Attorney

Comment: Each county is required to have a bail schedule listing bailable felony offenses and the amount of bail the judges have determined to be applicable to each listed offense. Pen C §1269b. The trial court has discretion to set a different bail, but a departure from the bail schedule must be supported by a finding of “unusual circumstances” and the judge must identify those circumstances on the record. *In re Alberto* (2002) 102 CA4th 421, 425 n3; *In re Christie* (2001) 92 CA4th 1105.

In a typical felony case, bail is set or denied at the arraignment. This motion is ordinarily filed after bail has been set. Because it requests the court to revisit an issue it has already decided, it should be supported by new facts or evidence that was unavailable at the arraignment. *Alberto*, 102 CA4th at 430.

Cross-Reference: For discussion of release on bail, see Crim Law §§5.23–5.39.

§5.2 B. Motion to Set or Reduce Bail

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on [date] , at [time] , in Department [number] of the above-entitled court, or as soon thereafter as the matter may be heard, the defendant, [name] , will move the Court for an order reducing the bail from the present amount of [dollar amount] to the reduced amount of [dollar amount] .

This motion will be based on the attached supporting memorandum [and declaration(s)] , the attached declaration of the defendant, all court documents in this case, and evidence and argument presented at the hearing on this motion.

Date: _____

Respectfully submitted,

 [Signature of attorney]

 [Typed name]

 [Title if in public defender office]

Attorney for [name of defendant]

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

Article I, §12, of the California Constitution states that the court shall set bail unless an exception applies. The exceptions in the Constitution are for (a) capital cases; (b) “[f]elony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that there is a substantial likelihood the person’s release would result in

great bodily harm to others”; and (c) “[f]elony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.” (See *In re White* (review granted May 24, 2018, S248125; superseded opinion at 21 CA5th 18).) The phrase “the facts are evident or the presumption great” means the evidence in the record would be sufficient to sustain a conviction. (*In re Nordin* (1983) 143 CA3d 538, 543.) When the court does set bail, article I, §12 provides that, in fixing the amount of bail, the court may not require bail that is “excessive.” The primary consideration in setting bail is public safety. (Pen. Code §1275, subd. (a).) The court must take into consideration the seriousness of the offense charged, the defendant’s previous criminal record, and the probability of the defendant’s appearing at the trial or hearing of the case. (Pen. Code §1275, subd. (a).)

If the court is not permitted to deny bail, due process (US Const amend XIV; Cal Const art I, §15) requires the court to release the defendant on his or her own recognizance, unless the court “finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and the community.” (*In re Humphrey* (review granted May 24, 2018, S247278; superseded opinion at 19 CA5th 1006).)

[Add if applicable]

Although the defendant’s bail is now set at the amount listed in the bail schedule maintained pursuant to Penal Code section 1275, subdivision (c), the trial court has discretion to reduce the defendant’s bail under unusual circumstances. (Pen. Code §1275, subd. (c); *In re Alberto* (2002) 102 CA4th 421, 430.) Such circumstances exist in this case. __[Explain the unusual circumstances that authorize the court to reduce defendant’s bail below the amount listed in the bail schedule.]__

[Continue]

__[Specify why bail should be set or the current bail is excessive and why it is appropriate to release the defendant on his or her own recognizance or at an amount requested under the considerations mandated by

the applicable law cited above, with reference to supporting declaration(s) (e.g., by attorney and defendant) if applicable]__.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.

See §1.9; Crim Law §18.5.]

**DECLARATION IN SUPPORT OF MOTION TO REDUCE
BAIL IN CASE NO. _____**

1. I, __[name]__, am the defendant in the case of People v __[name of defendant]__, Case No. _____.

2. I declare that the following facts are true.

3. __[Set forth in this and subsequent numbered paragraphs the facts relevant to the motion, e.g., length of residence in community, stable family situation, steady employment, lack of prior record]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

Respectfully submitted,

__[Signature]__

__[Typed name]__

Defendant

Comment: It is essential to present facts that were unavailable when bail was originally set. *In re Alberto* (2002) 102 CA4th 421, 430.

Cross-Reference: On the factors relevant to the amount of bail, see Crim Law §§5.30–5.32.

§5.3 C. Motion to Examine Source of Bail

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

The People allege and assert that all or some portion of any consideration, pledge, security, deposit, or indemnification that has been or will be paid, given, made, or promised to obtain bail for the above-named defendant and prisoner has been feloniously obtained and therefore, pursuant to Penal Code section 1275.1, cannot be used for the purpose of bail.

This motion is based on the accompanying declaration(s) of probable cause, all court documents in this case, any testimony taken pursuant hereto, and any other document(s) attached to this motion.

WHEREFORE, the People request an order prohibiting the acceptance of any bail proffered on behalf of this defendant and prisoner and prohibiting __[his/her]__ release on bail unless and until a full hearing is conducted pursuant to Penal Code section 1275.1 and at such hearing the defendant establishes by a preponderance of the evidence that no part of the moneys and goods proffered to obtain bail was feloniously obtained.

THE HISTORY OF THE UNITED STATES

THE HISTORY OF THE UNITED STATES
 FROM THE FIRST SETTLEMENTS
 TO THE PRESENT TIME
 BY J. W. FULTON

THE HISTORY OF THE UNITED STATES
 FROM THE FIRST SETTLEMENTS
 TO THE PRESENT TIME
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 TO THE PRESENT TIME
 BY J. W. FULTON

THE HISTORY OF THE UNITED STATES
 FROM THE FIRST SETTLEMENTS
 TO THE PRESENT TIME
 BY J. W. FULTON

Date: _____

Respectfully submitted,
__[Name of District Attorney]__
District Attorney
__[Signature of deputy district attorney]__
__[Typed name]__
Deputy District Attorney

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

Penal Code section 1275.1, in relevant part, reads as follows:

Bail ... shall not be accepted unless a judge or magistrate finds that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.

***U.S. v Nebbia* (2d Cir 1966) 357 F2d 303, 324, holds:**

[T]he mere deposit of cash bail is not sufficient to deprive the court of the right to inquire into other factors which might bear on the question of the adequacy of the bail.

***U.S. v Melville* (SD NY 1970) 309 F Supp 824, 826, holds:**

[T]he function of bail is not to purchase freedom for the defendant but to provide assurance of his reappearance after release on bail; a guarantee of the obligation of the defendant to appear.... For this purpose it becomes appropriate to identify the sources of bail and ascertain their purpose and satisfy the Court that there is a moral assurance for reappearance to be gained by acceptance of the funds emanating from such sources.

See also *U.S. v Ellis Demarchena* (SD Cal 1971) 330 F Supp 1223, 1271, and *U.S. v Perrone* (SD Fla 1976) 413 F Supp 861, both of which hold that it is the right and duty of a court to inquire into sources of bail and premiums and collateral for bail to see that the money is coming from a legitimate source and will actually serve to ensure the defendant's reappearance, not merely to purchase his or her freedom.

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

**DECLARATION OF PROBABLE CAUSE IN SUPPORT OF
MOTION TO EXAMINE SOURCE OF BAIL IN
CASE NO. _____**

I, __[name]__, declare as follows:

1. That I am a __[police officer/deputy district attorney]__.

2. That I am assigned to this matter.

3. That __[state facts justifying belief that all or some portion of any money or consideration proffered for bail has been feloniously obtained]__.

WHEREFORE, it is my belief that all or some portion of any consideration, pledge, security, deposit, or indemnification that has been or will be paid, given, made, or promised to obtain bail for this prisoner has been feloniously obtained and, pursuant to Penal Code section 1275.1, cannot be accepted for bail purposes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[Signature of declarant]__

__[Typed name]__

__[Job title of declarant]__

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff,
vs
__[Name(s)]__,
Defendant(s)**

**Dept. __[number]__
No. __[case number]__
[PROPOSED] ORDER
PROHIBITING ACCEPTANCE
OF PROFFERED BAIL**

**TO __[NAME OF LAW ENFORCEMENT OFFICER]__, OR ANY OTHER
LAW ENFORCEMENT AGENCY HAVING CUSTODY OF DEFENDANT-
PRISONER, __[NAME]__, BOOKING # __[NUMBER]__:**

**GOOD CAUSE HAVING BEEN SHOWN, IT IS ORDERED that, in the
event bail is proffered for the above-described defendant-prisoner,
such bail shall not be accepted for this defendant-prisoner nor shall
this defendant-prisoner be released from custody unless and until
this Court or any other competent court has conducted a hearing
pursuant to Penal Code section 1275.1 and has issued an order
requiring the acceptance of bail and the release of the defendant-
prisoner.**

Date: _____

__[Signature of Judge]__

__[Typed name]__

Judge of the Superior Court

Comment: The trial court cannot accept a bail bond if any portion of it was feloniously obtained. Pen C §1275.1; *People v Indiana Lumbermens Mut. Ins. Co.* (2011) 192 CA4th 929, 936. See, e.g., *People v Pollard* (2001) 90 CA4th 483. If there is reason to believe that the funds the defendant will use to post bail come from an illicit source, the prosecutor may move to examine the source of bail. This motion could be combined with a motion to increase bail.

Cross-Reference: For discussion of an inquiry into the source of bail money, see Crim Law §5.33.

Arraignment

I. OVERVIEW

- A. Waiver of Defendant's Personal Appearance (Felonies) §6.1
- B. Waiver of Personal Appearance (Sentencing) §6.2
- C. Misdemeanor Guilty Plea in Absentia §6.3

I. OVERVIEW

§6.1

A. Waiver of Defendant's Personal Appearance (Felonies)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT:

The defendant, __[name]__, having been advised of __[his/her]__ right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and to cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. Examples of hearings concerning which the defendant waives the right to be present include when the case is set for trial, when a continuance is ordered, when a motion to set aside the indictment or information pursuant to the provisions of Penal Code section 995 and following is heard, when a motion for reduction of bail or for a personal recognizance release is heard, and when a motion to reduce sentence is heard.

The undersigned defendant hereby requests the Court to proceed during every absence of the defendant that the Court may permit pursuant to this waiver, and hereby agrees that __[his/her]__ interest is represented at all times by the presence of __[his/her]__ attorney the same as if the defendant were personally present in court, and fur-

ther agrees that notice to defendant's attorney that defendant's presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of defendant's appearance at that time and place.

Date: _____ [Signature of defendant]____
 _____ [Typed name]____
 _____ [Address]____

Approved:

Date: _____ [Signature of attorney]____
 _____ [Typed name]____

Comment: This form contains the recommended language of Pen C §977(b), with the addition of examples of specific hearings covered by the §977(b) waiver. The court must give the defendant permission to take advantage of Pen C §977. The form must be signed by the defendant in open court and approved by defense counsel, and it must be filed with the court. Pen C §977(b).

Misdemeanor defendants ordinarily may appear through counsel and do not need to sign a waiver. See Pen C §977(a). A local rule requiring misdemeanor defendants to appear at readiness and settlement conferences pursuant to a blanket court policy violated the statute. *Bracher v Superior Court* (2012) 205 CA4th 1445, 1458.

Cross-Reference: For further discussion of §977(b) waivers, see California Criminal Law Procedure and Practice §§6.5, 35.12–35.14 (Cal CEB).

§6.2 B. Waiver of Personal Appearance (Sentencing)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

DEFENDANT'S WAIVER OF __[HIS/HER]__ PERSONAL PRESENCE IN COURT

The undersigned defendant, knowing that it is __[his/her]__ right to be personally present at every stage of the proceedings against __[him/her]__, hereby gives up the right to be personally present in

court or chambers at the hearing on sentencing in __[his/her]__ case, or when a motion to reduce sentence may be heard, or when questions of law are presented to be argued or considered by the court. The undersigned defendant requests the court to proceed in __[his/her]__ absence as the court may decide pursuant to this waiver, and defendant agrees that __[his/her]__ interests will be represented at all times by the presence of __[his/her]__ attorney as if the defendant were personally present in court. This waiver is made pursuant to section 1193(a) of the Penal Code, which provides, in relevant part:

If the conviction is for a felony, the defendant shall be personally present when judgment is pronounced against him or her, unless the defendant, in open court and on the record, or in a notarized writing, requests that judgment be pronounced against him or her in his or her absence, and that he or she be represented by an attorney when judgment is pronounced, and the court approves his or her absence during the pronouncement of judgment, or unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his or her absence....

Date: _____ [Signature of defendant]_____
 _____ [Typed name]_____
 _____ [Address]_____

Date: _____ [Signature of attorney]_____
 _____ [Typed name]_____
Attorney for _____ [name of
 defendant]_____

Date: _____ [Signature of attorney]_____
 _____ [Typed name]_____
Witness

Comment: This form contains the exact language of Pen C §1193(a). The defendant should not waive his or her presence at sentencing and pronouncement of judgment unless there is a good reason for the waiver. For example, a defendant facing separate charges in another county or jurisdiction and anticipating that those charges will result in a prison sentence might prefer to postpone pronouncement of judgment and **sentencing in** the case at hand until after the other proceeding if there is an agreement for a concurrent sentence when the case returns. In this situation, the defen-

dant might prefer not to be returned from prison for the sentencing hearing. The defendant should not waive his or her presence at sentencing if there are sentencing issues to be litigated.

Because the pronouncement of judgment is a critical phase of the prosecution, a separate waiver should be used.

Cross-Reference: See California Criminal Law Procedure and Practice §§6.5, 35.13 (Cal CEB).

§6.3 C. Misdemeanor Guilty Plea in Absentia

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

GUILTY PLEA IN ABSENTIA

I, __[name of defendant]__, the defendant in this case, declare:

1. I know that I am charged with driving in violation of __[e.g., section 14601.1 of the Vehicle Code]__;

2. By signing this affidavit, I am pleading guilty to a lesser charge of a violation of __[e.g., section 12500 of the Vehicle Code]__;

3. I personally initialed and signed the attached waiver of rights;

4. I enter this plea freely and voluntarily without either threat or coercion or promise of benefit or reward, except that my lawyer has told me that my sentence will be __[e.g., a fine of \$211, plus \$35 administrative fee for paying by installments through Central Collections]__.

5. I hereby plead guilty to a violation of __[e.g., section 12500 of the Vehicle Code, driving without having a license in possession]__.

I declare under penalty of perjury that the above facts are true.

Date: _____

__[Signature of defendant]__

__[Typed name]__

__[Address]__

Comment: This form might be used for an out-of-county (or state) defendant who is pleading guilty to a misdemeanor, if the agreed-on disposition results in no jail time.

Pleadings; Joinder and Severance

I. OVERVIEW

- A. Demurrer §7.1
- B. Opposition to Demurrer §7.2
- C. Motion to Sever Counts §7.3
- D. Opposition to Motion to Sever Counts §7.4
- E. Motion to Sever Codefendants §7.5
- F. Opposition to Motion to Sever Codefendants §7.6

I. OVERVIEW

§7.1

A. Demurrer

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court dismiss __[specify whether entire charging document or particular named counts and/or enhancements are challenged]__ under Penal Code section 1004 __[specify applicable subdivision]__ on the __[ground/grounds]__ that __[specify applicable ground(s)]__. This demurrer will be based on the attached supporting memorandum, on the charging document in this case, and on such argument as may be made at the hearing on this demurrer.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____**Attorney for** _____[name of
defendant]____

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

*[The following argument is made only if a plea of not guilty
has already been entered.]*

THE COURT HAS THE POWER TO RULE ON A DEMURRER EVEN AFTER A PLEA HAS BEEN ENTERED

The Court has the authority to allow the defendant to demur to the charges even though a plea has been entered. (Penal Code section 1003.) _____[Give any facts about the case that argue in favor of permitting the plea to be withdrawn and a demurrer made, e.g., that the defendant entered a plea without counsel, or with different counsel.]____

*[The main issues raised by demurrer are set out below;
choose the one(s) applicable to your case.]*

THE COURT HAS NO JURISDICTION OVER THE OFFENSE CHARGED IN THAT IT ALLEGES THAT THE OFFENSE WAS COMMITTED ON A DATE BEYOND THE STATUTE OF LIMITATIONS

Ordinarily, a prosecution is barred once the period of time given in the appropriate statute of limitations has run. (Penal Code sections 799–805.) Violation of _____[specify statute of crime charged]____ **is subject to a** _____[specify number of years of statute of limitations for that crime]____ **- year statute of limitations. The charging document in this action alleges that the crime occurred on** _____[date]____. **The date that the prosecution of this case is considered to have begun for purposes of the statute of limitations is** _____[insert date; see Pen C §804 and discussion in Crim Law §19.14]____. _____[Number of years]____ **have passed between the date the alleged crime occurred and** _____[specify event that triggered

prosecution for purposes of the statute of limitations]. . . The prosecution of the charged offense therefore did not begin within the statute of limitations period.

**THE PROSECUTION DID NOT ALLEGE ANY FACTS THAT
WOULD EXEMPT THIS CASE FROM THE BAR OF THE
STATUTE OF LIMITATIONS**

Although the statute of limitations for a particular offense generally starts to run from the date of the commission of the offense, for certain offenses, the period starts to run from “discovery of an offense.” (Penal Code section 803(c).)

The phrase “discovery of an offense” is not defined in section 803(c), nor does the law designate the specific person who qualifies as a discoverer. The statute does not set forth any pleading requirements.

Case law has provided guidance for the courts and for prosecutors in this regard. In *People v Zamora* (1976) 18 C3d 538, the California Supreme Court imposed the following requirements on criminal pleadings:

We do not believe that technical rules of pleading in criminal cases will be resurrected by requiring that the following facts be alleged in an accusatory pleading which seeks to avoid the bar of the statute of limitations by pleading the “discovery” provision of [former] section 800: (1) the date on which the offense was “discovered”; (2) how and by whom the offense was “discovered”; (3) lack of knowledge, both actual and constructive, prior to the date of “discovery”; (4) the reason why the offense was not “discovered” earlier.

18 C3d at 565 n26. See also *People v Lopez* (1997) 52 CA4th 233, 245.

These “facts” (not just a statement worded in conclusory language) are required to be pleaded in felony cases even before the preliminary hearing. As the *Zamora* court stated:

[I]n order to hold a defendant over for trial the People carry the burden of producing evidence (either before the grand jury or at the preliminary hearing) which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations. [Citation omitted.] We believe that the com-

mitting magistrate or the trial court will be aided in making the probable cause determination by specific pleading on the limitation issue.

18 C3d at 565.

In the present case, the accusatory pleading fails to set forth any facts that would exempt this case from the statute of limitations bar; therefore, the defendant's demurrer should be sustained.

**THE COURT HAS NO JURISDICTION OVER THE OFFENSE
CHARGED IN THAT THE ACCUSATORY PLEADING
ALLEGES THAT THE OFFENSE OCCURRED IN _____
COUNTY. THIS COUNTY, THEREFORE, DOES NOT HAVE
JURISDICTION**

The charging document alleges that the offense occurred in _____ County. With limited exceptions that do not apply in this case (see, e.g., Penal Code section 784.7), a county is without jurisdiction to try an offense not committed within its boundaries. (See *People v Crise* (1990) 224 CA3d Supp 1 (conviction reversed because defendant was tried on Health and Safety Code section 11550 in county unrelated to one where conduct occurred).) __[Specify relevant law, and apply it to the facts of the case. See Pen C §1004(1); Crim Law §720.]__

**THE ACCUSATORY PLEADING FAILS TO GIVE THE
DEFENDANT ADEQUATE NOTICE OF THE CHARGES
AGAINST __[HIM/HER]__**

Due process under both the federal and state constitutions requires that the defendant receive adequate notice of the charges so that he or she may have a reasonable opportunity to prepare a defense and not be taken by surprise at trial. (See, e.g., *In re Oliver* (1948) 333 US 257, 273, 68 S Ct 499; *In re Jamil H.* (1984) 158 CA3d 556, 559; *Gaylord v Municipal Court* (1987) 196 CA3d 1348, 1351; *Lamadrid v Municipal Court* (1981) 118 CA3d 786; *Sallas v Municipal Court* (1978) 86 CA3d 737 (decision reversed because complaint failed to specify what regulation minor violated by entering school grounds without lawful reason).) __[Specify relevant law, and apply it to the facts of the case. Crim Law §721.]__

**THE ACCUSATORY PLEADING IS UNCERTAIN IN THAT IT
DOES NOT SUBSTANTIALLY CONFORM TO THE
PROVISIONS OF PENAL CODE SECTIONS 950 AND 952**

__[Specify relevant law, and apply it to facts. See Pen C §1004(2); People v Hathaway (1972) 27 CA3d 586; People v Jordan (1971) 19 CA3d 362. See also Crim Law §7.21.]__

**__[SPECIFY STATUTE]__ IS UNCONSTITUTIONALLY
VAGUE AND OVERBROAD**

To provide due process under both the state and federal constitutions, a criminal statute must “be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.” *Williams v Garcetti* (1993) 5 C4th 561, 567, quoting *Walker v Superior Court* (1988) 47 C3d 112, 141. Vague laws may trap the innocent by failing to provide fair warning about what conduct is prohibited and invite arbitrary and discriminatory enforcement by failing to provide explicit standards for those who apply them. *Williams v Garcetti, supra*. See also *Grayned v City of Rockford* (1972) 408 US 104, 108, 92 S Ct 2294. __[Specify relevant law, and apply it to the affected statute.]__

**THE OFFENSES OF __[SPECIFY TYPE OF OFFENSE AND
COUNT NUMBERS]__ ARE MISJOINED IN THAT THEY
WERE NOT CONNECTED TOGETHER IN THEIR
COMMISSION AND DO NOT CONTAIN COMMON
ELEMENTS OF SUBSTANTIAL IMPORTANCE**

__[Specify relevant law, and apply it to the affected statute. Note that it is usually difficult to challenge this type of error by demurrer because it is usually not clear from the face of the charging document. See Pen C §1004(3); Crim Law §7.22. This type of error is usually raised by a severance motion. See Crim Law §§7.27–7.42.]__

**THE ALLEGATION OF __[SPECIFY STATUTE OR
COUNT]__ DOES NOT STATE A PUBLIC OFFENSE**

__[Specify relevant law, and apply it to the allegations in the charging document. See Pen C §1004(4); Crim Law §7.23.]__

**THE LANGUAGE CHARGING VIOLATION OF __[SPECIFY
CHARGE OR COUNT]__ CONTAINS MATTER THAT, IF
TRUE, CONSTITUTES __[LEGAL
JUSTIFICATION/EXCUSE]__ OF THE OFFENSE CHARGED**

__[Specify relevant law, and apply it to the allegations in the charging document. See Pen C §1004(5); Crim Law §724.]__

[Continue]

**A DEMURRER IS THE APPROPRIATE WAY OF
CHALLENGING __[STATE GROUNDS FOR CHALLENGE,
E.G., VIOLATION OF STATUTE OF LIMITATIONS]__**

__[Specify authority that allows the particular type of challenge to the charging document to be made by demurrer. See discussion in Crim Law §§720–726.]__

**A DEMURRER IS A CHALLENGE TO THE JURISDICTION
OF THE COURT OVER THE OFFENSE CHARGED; THE
REMEDY FOR LACK OF JURISDICTION IN THIS CASE IS
DISMISSAL**

When the Court has no jurisdiction over the offense charged, the Court is to sustain the demurrer. (Penal Code section 1007.) If the Court believes that the prosecution may correct the defect through amending the charging document, the Court must permit the prosecution that opportunity. Otherwise, the Court should dismiss the charge(s). (Id.) __[Tell the court why dismissal without giving the prosecution the opportunity to amend is appropriate, if that is the case.]__

CONCLUSION

Defendant respectfully requests that the demurrer be sustained and that __[specify charges]__ be dismissed.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__

Attorney for __[name of
defendant]__

Comment: A demurrer must be in writing and signed by the defendant or defense counsel. Pen C §1005. Unless otherwise ordered or specifically

provided by law, all pretrial motions (including demurrers), accompanied by a supporting memorandum, must be served and filed at least 10 court days before hearing date, all papers opposing the motion must be served and filed at least 5 court days before the hearing date, and all reply papers must be filed at least 2 court days before the hearing date. Proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a). On service and filing, see §1.17.

Cross-Reference: For discussion of demurrer to a charging document, see Crim Law §§7.19–7.26.

§7.2 B. Opposition to Demurrer

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

OPPOSITION MEMORANDUM

[The main opposition arguments to a demurrer are set out below; choose the one(s) applicable to your case, and add any others needed to oppose the motion.]

**DEFENDANT HAS ALREADY ENTERED A PLEA;
 __[HIS/HER]__ DEMURRER IS THEREFORE UNTIMELY
 AND SHOULD BE OVERRULED**

Demurrers are to be made before a plea is entered, unless allowed by the court. (Penal Code section 1003.) __[Give specific factual arguments for why the court should not make an exception in this case and consider the demurrer.]__

**THE GROUND FOR DEFENDANT'S DEMURRER IS NOT
 ONE PERMITTED BY LAW**

The only objections allowed to be raised by demurrer are those set out in Penal Code section 1004. *People v Saffell* (1946) 74 CA2d Supp 967, 972. The issue raised by defendant is not one of those listed in section 1004 and is therefore not permitted to be raised by demurrer. The Court should deny defendant's demurrer.

**SUPPORT FOR DEFENDANT'S DEMURRER IS NOT
APPARENT FROM THE FACE OF THE CHARGING
DOCUMENT**

A demurrer may challenge only those defects that appear on the face of the charging document. (Penal Code section 1004.)
 __[Describe why the defects alleged by the defense do not appear on the face of the charging document.]__

**THE DEFENSE DEMURRER __[WAS NOT IN WRITING/WAS
NOT IN WRITING AND DID NOT "DISTINCTLY SPECIFY" THE
GROUNDS OF THE OBJECTION]__**

A defense demurrer must be in writing, and "distinctly specify" the grounds of objection. (Penal Code section 1005.) Failure to observe either of these requirements requires the court to disregard the demurrer. (Penal Code section 1005.) __[Describe the defects.]__

**EVEN IF THE COURT SUSTAINS DEFENDANT'S
DEMURRER, THE COURT IS REQUIRED TO ALLOW THE
PROSECUTION TO AMEND THE CHARGING DOCUMENT
(PENAL CODE SECTION 1007)**

__[Explain how the charging document might be amended to meet the defense challenge.]__

CONCLUSION

The People request that this court overrule defendant's demurrer because __[summarize grounds]__.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

Comment: Ordinarily, a demurrer raises only legal issues. In this situation, an opposition memorandum by itself may be an appropriate opposition.

Unless otherwise ordered or specifically provided by law, all papers opposing the demurrer must be served and filed at least 5 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a). On service and filing, see §1.17.

Cross-Reference: For discussion of demurrers, see California Criminal Law Procedure and Practice §§7.19–7.26 (Cal CEB).

§7.3 C. Motion to Sever Counts

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court sever __[specify count(s)]__ from __[specify count(s)]__. This motion will be based on the attached supporting memorandum, on the court records and pleadings in the court files for this case, __[describe any other attached exhibits, e.g., a declaration by counsel, a portion of the preliminary hearing transcript]__, and on any evidence and argument that may be presented at the hearing on this motion.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[The main issues raised in a motion to sever counts are set out below; choose the one(s) applicable to your case, and any others that support your motion.]

COUNT __[SPECIFY COUNT]__ IS SUPPORTED BY MUCH STRONGER EVIDENCE THAN COUNT __[SPECIFY COUNT]__, AND IS BEING USED TO BOLSTER COUNT __[SPECIFY COUNT]__

When one count is supported by stronger evidence, and is being used to bolster another count, particularly one supported with weaker evidence, that is a factor supporting severance. (*Williams v Superior Court* (1984) 36 C3d 441, 452; *Coleman v Superior Court* (1981) 116 CA3d 129.) Joining these counts violates the defendant's right to a fair trial under the Fifth and Sixth Amendments to the United States Constitution. An accused retains federal due process rights even after passage of Penal Code section 954.1 because federal due process rights cannot be abrogated by the voters of California. (See *Belton v Superior Court* (1993) 19 CA4th 1279, 1285.) __[Describe the difference between the two counts in your case, and why one is being used to bolster the other.]__

NO EVIDENCE IS CROSS-ADMISSIBLE BETWEEN COUNTS __[NUMBER]__ AND __[NUMBER]__

Penal Code section 954.1 states that the cross-admissibility of evidence between counts is not a factor that requires severance of counts. The fact that there is no cross-admissible evidence, however, may still be considered as a factor suggesting prejudice. (*Belton v Superior Court* (1993) 19 CA4th 1279.) __[Explain why no evidence is cross-admissible.]__

COUNT __[NUMBER]__ IS HIGHLY INFLAMMATORY; COUNT __[NUMBER]__ IS NOT

Count __[number]__, charging __[type of crime]__, involves inflammatory facts, __[e.g., the rape of a child]__. The other charge, __[name of crime]__, does not. A joint trial of a common crime with a shocking one would make it difficult for defendant to obtain a fair trial on the less important charge. (*Coleman v Superior Court, supra.*)

DEFENDANT WILL BE PREJUDICED IF COUNTS __[NUMBER]__ AND __[NUMBER]__ ARE JOINED FOR TRIAL BECAUSE PREJUDICIAL EVIDENCE IS ADMISSIBLE ON ONLY ONE OF THE TWO COUNTS

When joinder permits the admissibility of prejudicial evidence, such as a prior felony conviction, that would not otherwise be admis-

sible, defendant can be prejudiced. (*Walker v Superior Court* (1974) 37 CA3d 938, 942.) __[Describe the prejudicial evidence in your case.]__

JOINDER IS IMPROPER BECAUSE THE REQUIREMENTS OF PENAL CODE SECTION 954 HAVE NOT BEEN MET

When different offenses are joined, the complaint must show on its face that joinder is proper under at least one of the classifications specified in Penal Code section 954. (*People v Degnen* (1925) 70 CA 567.) __[Describe the specific violation. Penal Code §954 requires that two different offenses be connected together in their commission, or be different statements of the same offense, or be of the same class of offense. See, e.g., *People v Madden* (1988) 206 CA3d Supp 14.]__

[Continue]

DEFENDANT WILL BE PREJUDICED BY THE JOINDER OF COUNTS __[NUMBER]__ **AND** __[NUMBER]__ **BECAUSE** __[DESCRIBE PREJUDICE]__. **THE COURT SHOULD THEREFORE SEVER COUNTS** __[NUMBER]__ **AND** __[NUMBER]__

When a defendant shows proper grounds for severance of counts, and prejudice from joinder, a severance should be ordered. (*People v Johnson* (1988) 47 C3d 576.) "[T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in an accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (Penal Code section 954.) __[Summarize why the judge should exercise his or her discretion to sever counts.]__

CONCLUSION

Defendant requests that the court sever count __[number]__ from count __[number]__ for the above reasons.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

Comment: When it appears on the face of the information that offenses are joined in violation of Pen C §954, the defendant should demur to the accusatory pleading. Pen C §1004(3). See Pen C §1012 (failure to demur to errors that appear on face of pleading and are mentioned in Pen C §1004(2)–(3), (5), which includes improper joinder, waives right to challenge error).

A severance motion must be in writing, accompanied by a supporting memorandum, and served on all parties. See Cal Rules of Ct 4.111. See §1.17 for the service and filing requirements of Cal Rules of Ct 4.111.

When assessing the propriety of joinder, the court considers (1) whether evidence is cross-admissible in separate trials; (2) whether some of the joined charges are likely to “unusually inflame” jurors against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the outcome of some or all of the charges may be altered by the totality of the evidence; and (4) whether one of the charges is a capital offense, or the joinder of the charges makes the case a capital case. *People v O’Malley* (2016) 62 C4th 944, 968; *People v Mendoza* (2000) 24 C4th 130, 161; see also *People v Cook* (2006) 39 C4th 566, 581, quoting *People v Mendoza, supra*. However, when crimes of the same class are joined together, evidence concerning one offense need not be admissible to prove the other offense for joinder to be permissible. *People v Cook, supra*, quoting Pen C §954.1.

The burden of demonstrating prejudice is on the moving party. See *People v Cook, supra*. Counsel should therefore submit exhibits or other evidence that supports the argument that joinder would be prejudicial. For example, police reports might be attached when one crime is alleged to be inflammatory, and the defendant’s confession to one of the charged crimes might be attached when it is alleged that a strong case is joined with a weak case. *People v Kemp* (1961) 55 C2d 458, 477.

To be successful in a motion to sever counts that are properly joined under Pen C §954, the defendant must show that the evidence is not cross-admissible *and* that severance is necessary to afford the defendant a fair trial. See *Williams v Superior Court* (1984) 36 C3d 441, 448. See also *Calderon v Superior Court* (2001) 87 CA4th 933 (joinder improper on facts of case). Absence of cross-admissibility of evidence does not require severance. *People v Simon* (2016) 1 C5th 98; *People v O’Malley* (2016) 62 C4th 944. Whether to sever properly joined counts is a matter of trial court discretion. Pen C §954; *People v Price* (1991) 1 C4th 324, 388.

Cross-Reference: For discussion of severance, see Crim Law, chap 7.

§7.4 D. Opposition to Motion to Sever Counts

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

OPPOSITION MEMORANDUM

[The main opposition arguments to a motion to sever counts are set out below; choose the one(s) applicable to your case, and add any others needed to oppose the motion.]

BOTH OF THE CRIMES CHARGED ARE REPULSIVE AND INFLAMMATORY; THE FACT THAT ONE MAY BE SOMEWHAT MORE INFLAMMATORY THAN THE OTHER IS NOT GOOD GROUNDS FOR SEVERING COUNTS

Crimes are usually upsetting to the average juror. The crimes charged against the defendant are no different. See the police reports from these cases, attached as Exhibits 1 and 2. Defendant tries to distinguish one crime as more inflammatory than the other, but in fact they are both disturbing. They are appropriately joined under Penal Code section 954, and should remain joined.

THE LACK OF CROSS-ADMISSIBLE EVIDENCE DOES NOT REQUIRE SEVERANCE

Penal Code section 954.1 specifically allows crimes to be charged that share no cross-admissible evidence. The counts charged in the instant case are properly charged under Penal Code section 954, and therefore should remain joined.

DEFENDANT WILL NOT BE PREJUDICED IF THE __[DESCRIBE EVIDENCE ALLEGED TO BE PREJUDICIAL, E.G., PRIOR CONVICTION]__ CONCERNING COUNT __[NUMBER]__ IS INTRODUCED IN A TRIAL ALSO INVOLVING COUNT __[NUMBER]__

__[Describe why the evidence alleged to be prejudicial will not in fact be prejudicial, e.g., because that evidence would probably be introduced even if the cases were separately tried.]__

JOINDER IS IN ACCORD WITH PENAL CODE SECTION 954

When different offenses are joined, the complaint must show on its face that the joinder is proper under at least one of the classifications

specified in Penal Code section 954. (*People v Degnen* (1925) 70 CA 567.) __[Describe how the charged offenses are properly charged. Penal Code §954 requires that two different offenses be connected together in their commission, or be different statements of the same offense, or be of the same class of offense.]__

[If joined crimes are of the same class, describe them. If crimes are of the same class, "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together." People v Cook (2006) 39 C4th 566, 581, quoting Pen C §954.1.]

CONCLUSION

The People request that this Court deny defendant __[name]__'s severance motion for the reasons given above.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

Comment: Be sure to attach as exhibits whatever documents are necessary to support your opposition. Include references to them in your opposition memorandum.

Cross-Reference: For discussion of severance of counts, see California Criminal Law Procedure and Practice §§7.31–7.36 (Cal CEB).

§7.5 E. Motion to Sever Codefendants

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order

defendant's matter severed from that of __[codefendant/
codefendants]__, __[name(s)]__. **This motion will be based on the
attached supporting memorandum, __[the attached declarations(s),
the attached exhibit(s),]__ all papers filed and records in this action,
evidence taken at the hearing on this motion, and argument at that
hearing.**

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__

Attorney for __[name of
defendant]__

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

*[The main issues raised by a motion to sever codefendants
are set out below; choose the one(s) applicable to your case,
and any others that support your motion.]*

SEVERANCE MUST BE GRANTED WHEN DEFENDANTS ARE NOT ALL JOINED IN A COMMON COUNT

**If a particular defendant is not jointly charged in one count with all
other defendants, the trial court is required to order a severance on
defense motion. (Penal Code section 954; *People v Ortiz* (1978) 22
C3d 38, 42.) It is not sufficient that the joined offenses are of the same
class (see *People v Simms* (1970) 10 CA3d 299, 307), or that they have
common elements (*Dove v Superior Court* (1974) 39 CA3d 960, 963).**

**__[Discuss the law relevant to the facts of your case, and apply it to these
facts.]__**

THE TRIAL COURT SHOULD EXERCISE ITS DISCRETION TO ORDER SEVERANCE WHEN THE PROSECUTION PLANS TO USE THE EXTRAJUDICIAL STATEMENT OF A CODEFENDANT AND EFFEC- TIVE EXCISION IS NOT POSSIBLE

**The right of confrontation, guaranteed by the Sixth Amendment to
the United States Constitution precludes the introduction against a**

criminal defendant of “testimonial” hearsay, unless (1) the declarant is unavailable and (2) the defendant has had an opportunity to cross-examine the declarant. (*Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354.)

In *Bruton v U.S.* (1968) 391 US 123, 88 S Ct 1620, the United States Supreme Court held that when a nontestifying codefendant’s out-of-court statement implicates another codefendant, the statement is inadmissible at a joint trial. (See also *People v Cortez* (2016) 63 C4th 101, 125 (limited to testimonial statements); *People v Aranda* (1965) 63 C2d 518 (relying on California Constitution).) The error cannot be cured by a limiting instruction admonishing the jury to consider the statement only as to the declarant. (*People v Aranda, supra*; see also *People v Boyd* (1990) 222 CA3d 541.)

Only if the trial court can effectively delete all parts of the extrajudicial statement implicating a codefendant, can the statement be used in a joint trial. “By effective deletions, we mean not only direct and indirect identifications of codefendants, but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established.” (*People v Aranda* (1965) 63 C2d 518, 528; see *People v Fulks* (1980) 110 CA3d 609, 616.) A statement that contains a reference to another perpetrator has not been effectively redacted when the jury can immediately infer that the other perpetrator is the defendant. (*Gray v Maryland* (1998) 523 US 185, 118 S Ct 1151.)

When the incriminating portions of the extrajudicial statements cannot be effectively deleted, the trial court must grant severance or exclude the statements. (*People v Song* (2004) 124 CA4th 973, 980.)

___[Discuss the facts of your case and why effective excision is not possible.]___

ASSUMING, ARGUENDO, THAT THE COURT CAN EFFECTIVELY EDIT THE DEFENDANT’S STATEMENTS, THE DEFENSE HAS A RIGHT TO ADMISSION OF THE REMAINDER OF THE STATEMENTS UNDER EVIDENCE CODE SECTION 356 TO SHOW DEFENDANT’S INTENT AND STATE OF MIND

Evidence Code section 356 allows for the relevant remainder of a statement to come into evidence once the prosecution offers a portion of it.

THE COURT SHOULD GRANT SEVERANCE TO PERMIT THE CODEFENDANT TO TESTIFY FOR DEFENDANT AT DEFENDANT'S TRIAL

The case of *People v Isenor* (1971) 17 CA3d 324, 332, holds that if the answers to the following questions are in the affirmative, the court should grant a severance in order to permit the codefendant to testify in favor of the defendant.

The questions are:

1. Does the defendant wish the codefendant to testify in defendant's case?
2. Will the testimony exculpate defendant?
3. Is the testimony significant?
4. Does the testimony appear to be bona fide?
5. Is it likely that the codefendant will actually testify?
6. What is the effect of granting the motion in terms of judicial administration and economy?

In this case, the attached declaration of __[name]__ clearly establishes an affirmative answer to all the above questions, and the effect on judicial administration would not be excessively deleterious. A denial of the motion would be severely prejudicial, because the defendant would be prevented from introducing important exculpatory evidence, and would therefore be denied a fair trial.

THE COURT SHOULD GRANT A SEVERANCE BECAUSE THE DEFENDANT WOULD BE SERIOUSLY PREJUDICED BY BEING TRIED TOGETHER WITH THE CODEFENDANT

A severance is proper under the following circumstances:

[There are a number of accepted factors that favor severing codefendants; choose the relevant ones from the following list, add other relevant law, and apply the law to the facts of your case.]

Potentially antagonistic defenses (*People v Graham* (1969) 71 C2d 303, 330);

Great disparity between the count charged against the defendant and the one against the codefendant (*People v Chambers* (1964) 231 CA2d 23, 27);

Disparity in the weight of the evidence against each defendant (*People v Chambers, supra*, 231 CA2d at 29);

Evidence potentially prejudicial to the defendant will be admitted at trial, ostensibly against the codefendant (*People v Biehler* (1961) 198 CA2d 290, 298; see also *People v Massie* (1967) 66 C2d 899, 916);

The codefendant intends to offer evidence harmful to the defendant (*People v Graham* (1969) 71 C2d 303, 331);

Evidence was suppressed as to the defendant but not as to the codefendant (*Brown v U.S.* (1973) 411 US 223, 93 S Ct 1565);

Joinder can result in a conviction of the defendant because of the association with codefendants of disreputable character (*People v Massie* (1967) 66 C2d 899, 916; *People v Chambers* (1964) 231 CA2d 23, 27);

The prosecution's motive for the joinder was improper, e.g., to obtain a delay, or for other motives not authorized by the statute (see *People v Graham* (1969) 71 C2d 303, 330; *People v Clark* (1965) 62 C2d 870, 883); and

The jury will be confused by evidence on multiple counts (see *Zafiro v U.S.* (1993) 506 US 534, 113 S Ct 933; *People v Hardy* (1992) 2 C4th 86, 168; *People v Chambers* (1964) 231 CA2d 23, 27).

[Point out in a separate heading and argument any practical circumstances that support a severance, e.g., that the case is set for trial to begin very soon but co-counsel is out to trial in a very lengthy case.]

CONCLUSION

Defendant requests that this severance motion be granted for the above reasons.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____Attorney for ____[name of
defendant]____

[Each declaration should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

DECLARATION OF COUNSEL

[This declaration is by defense counsel; the declaration of another person or persons may be required instead to support your motion. If that is the case, adapt this form as required.]

I, ____[name of defense counsel]____, under penalty of perjury, state as follows:

1. I am the attorney assigned to represent ____[name of defendant]____ in the above-entitled matter.

2. ____[Describe the charges against defendant and each codefendant. For example: Defendant Bruce Brown and codefendant Eric Brown are charged with two counts of robbery, one against defendant and one against codefendant. Codefendant Eric Brown is also charged with a (use clause).]____

3. ____[Include any other information known to counsel and relevant to the severance motion, e.g., that none of the joint charges involve a crime committed by both the defendant and the codefendant.]____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of declarant]____

_____[Typed name]____

_____[Title of declarant if in public
office]____

Comment: A motion for severance must usually be made before trial. Consult local court rules or practice for the appropriate time to make a

severance motion. Additional information or a change of circumstances may make it appropriate to renew a severance motion at trial. See *Griffin v Superior Court* (1972) 26 CA3d 672, 696 (common law motions concerning evidence not covered by Pen C §1538.5 may be relitigated during trial). When the basis for severance is a codefendant's statement, the motion is usually made during trial. See *People v Graham* (1969) 71 C2d 303, 330.

Severance motions must be in writing and served on all parties. Cal Rules of Ct 4.111. For discussion of service and filing requirements, see §1.17. The motion must be supported by affidavits or declarations and exhibits establishing a ground for relief and showing the likelihood of prejudice from a joint trial. When the motion is based on a statement by the codefendant, a copy of the statement should be attached as an exhibit.

Cross-Reference: For discussion of severance of codefendants, see Crim Law §§7.28, 7.37–7.41.

§7.6 F. Opposition to Motion to Sever Codefendants

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

MEMORANDUM IN OPPOSITION TO DEFENDANT __[NAME]__'S MOTION TO SEVER

**TO THE ABOVE-ENTITLED COURT, AND TO THE DEFENDANT AND
DEFENSE COUNSEL:**

[The main opposition arguments to a motion to sever codefendants are set out below; choose the one(s) applicable to your case, and add any others needed to oppose the motion.]

PENAL CODE SECTION 1098 FAVORS JOINT TRIALS

Penal Code section 1098 provides in part that “[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.” Accordingly, whether or not separate accusatory pleadings are filed, “a joint trial is contemplated, and a separate trial is a privilege and not a matter of right.” (*People v Parker* (1954) 122 CA2d 867, 871.)

DEFENSE ARGUMENT THAT SEPARATE TRIALS SHOULD BE ORDERED BECAUSE SOME EVIDENCE IS NOT CROSS-ADMISSIBLE IS CONTRARY TO ESTABLISHED LAW

Severance is not mandatory simply because the evidence from one case would not be admissible in the other case if separate trials were held (called cross-admissibility). (Penal Code section 954.1; *Belton v Superior Court* (1993) 19 CA4th 1279.) __ [You may also wish to argue that the evidence is not in fact cross-admissible.] __

CONTINUANCE OF THE TRIAL DATE OVER DEFENDANT __[NAME]__'S OBJECTION DOES NOT REQUIRE SEVERANCE BECAUSE CODEFENDANT __[NAME]__'S TRIAL DATE WAS CONTINUED FOR GOOD CAUSE, WHICH CONSTITUTES GOOD CAUSE FOR CONTINUING DEFENDANT __[NAME]__'S TRIAL

When a continuance of arraignment, preliminary hearing, or trial is granted to one codefendant for good cause, the continuance constitutes good cause (on prosecution motion) to continue the cases of all codefendants so as to maintain joinder. (Penal Code section 1050.1.) __ [Describe the good cause circumstances and support with a citation to the court file.] __

ALTHOUGH DEFENDANT AND CODEFENDANT ARE CHARGED WITH SEPARATE CRIMES, JOINDER IS PERMISSIBLE BECAUSE THE OFFENSES WERE PART OF THE SAME TRANSACTION

Although a joint trial is not permissible when two or more defendants are charged in separate counts with separate crimes (*Dove v Superior Court* (1974) 39 CA3d 960), an exception exists when codefendants are charged with committing offenses at the same time and place that were part of the same transaction. (*People v Wickliffe* (1986) 183 CA3d 37; *People v Hernandez* (1983) 143 CA3d 936.) __ [Describe the facts of the case, citing to the court file, or to attached documents such as police reports.] __

DEFENDANT SHOULD HAVE ATTACKED THE JOINDER OF CODEFENDANTS BY DEMURRING TO THE ACCUSATORY PLEADING

Failure to demur to errors that appear on the face of the pleading is a waiver of the right to challenge that error. (Penal Code section 1012.) __ [Describe why the error alleged by the defense fits in this category.] __

DEFENDANT SEEKS SEVERANCE BASED ON THE EXISTENCE OF CODEFENDANT'S STATEMENT; THIS MOTION MUST BE MADE AT A TIME WHEN THE COURT KNOWS WHETHER THE CODEFENDANT WILL TESTIFY

It is not error to admit a codefendant's statement that implicates defendant if the codefendant testifies, because the confessing defendant is available for cross-examination, even if __[he/she]__ denies having made the extrajudicial statement. (*Nelson v O'Neil* (1971) 402 US 622, 91 S Ct 1723; *People v Coffman & Marlow* (2004) 34 C4th 1, 43; *People v Ainsworth* (1988) 45 C3d 984, 1010, overruled on other grounds in *People v Sanchez* (2016) 63 C4th 665, 686 n13.) Because the defense is moving to sever before trial, this Court cannot know for sure whether codefendant __[name]__ will testify. The Court should therefore deny this motion as premature.

DEFENDANT ASKS THIS COURT TO TRY TO SANITIZE CODEFENDANT'S STATEMENT, BUT A FINAL RULING ON THAT ISSUE CAN ONLY BE MADE BY THE TRIAL JUDGE

The defendant asks this Court as part of __[his/her]__ motion to sever defendant from codefendant because it would be impossible to remove all parts of the statement that implicate defendant. This Court, however, cannot make a final ruling on how to sanitize a statement. Evidentiary issues must be finally decided by the trial judge. (See *People v Anderson* (1987) 43 C3d 1104, 1120; *Griffin v Superior Court* (1972) 26 CA3d 672, 696.)

__[If the defense did not comply with a local rule, e.g., on time to file motion, raise that issue as a reason to deny the motion.]__

CONCLUSION

The People request that this Court deny defendant __[name]__'s severance motion for the above reasons.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
 District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
 Deputy District Attorney

Comment: Attach as exhibits the documents that are necessary to support your opposition. Include cross-references to them in your opposition memorandum.

Cross-Reference: For discussion of severance of codefendants, see California Criminal Law Procedure and Practice §§7.28, 7.37–7.41 (Cal CEB).

Preliminary Hearings

I. OVERVIEW

- A. Defense Motion to Close Preliminary Hearing, Seal Preliminary Hearing Transcript, and for Protective Order **§8.1**
- B. Prosecution Memorandum in Opposition to Defendant's Motion to Close Preliminary Hearing, Seal Reporter's Transcript of Preliminary Hearing, and Issue Protective Order **§8.2**

I. OVERVIEW

§8.1 A. Defense Motion to Close Preliminary Hearing, Seal Preliminary Hearing Transcript, and for Protective Order

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court (1) issue a protective order to last until further order of the Court that proscribes extrajudicial statements by any lawyer, party, witness, court official, or law enforcement officer concerning this case, (2) close the preliminary hearing in this case to the press and public; and (3) seal the preliminary hearing transcript in this case until further order of the Court.

This motion is predicated on the following factors:

__[Summarize factors relevant to your case. For example: This case has received regional notoriety, and further comment on the case by either

the press or the parties involved would add to the existing publicity surrounding the case and clearly endanger a fair trial because of pretrial publicity.]_ _

This motion will be based on the attached supporting memorandum, _ _[the attached declarations(s), the attached exhibit(s)]_ _ , all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _

Respectfully submitted,

_ _[Signature of attorney]_ _

_ _[Typed name]_ _

_ _[Title if in public defender office]_ _

Attorney for _ _[name of defendant]_ _

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[Summarize your argument in a few sentences.]_ _

STATEMENT OF FACTS

_ _[State relevant facts, e.g., the charges, and a summary of publicity on the case. Cross-refer to exhibits attached to the motion, or lodged with the trial court.]_ _

ARGUMENT

THERE IS A SUBSTANTIAL PROBABILITY THAT AN OPEN PRELIMINARY HEARING WOULD NOT ALLOW THE DEFENDANT TO HAVE A FAIR TRIAL

The test for determining whether to close a criminal proceeding to the public is whether there is a substantial probability that an open

hearing would offset the right to a fair trial. (*Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13, 106 S Ct 2735 (*Press-Enterprise II*).)

In this case, __ *[Describe why your case meets the “substantial probability” test of Press-Enterprise II. Refer to specific publicity and attach copies as exhibits, or lodge them with the trial court.]* __

NO REMEDY SHORT OF CLOSURE OF THE PRELIMINARY HEARING WILL PROTECT DEFENDANT’S RIGHT TO A FAIR TRIAL

Remedies short of closure must be explored before the trial court may close a criminal proceeding to the public. (*Ortega v Superior Court* (1982) 135 CA3d 244.)

In this case, __ *[Specify other remedies that might be available, e.g., a gag order; sealing police reports and any inadmissible, inflammatory material; or a continuance. Explain why they would not be effective]* __

A PROTECTIVE ORDER DIRECTING THOSE INVOLVED WITH THIS CASE NOT TO RELEASE INFORMATION CONCERNING THE CASE IS NECESSARY BECAUSE OTHERWISE THERE IS A REASONABLE LIKELIHOOD THAT INFORMATION CONCERNING THE CASE WOULD MAKE IT DIFFICULT TO IMPANEL AN IMPARTIAL JURY AND WOULD TEND TO PREVENT A FAIR TRIAL

The test for determining the necessity of an order restraining the attorneys in this case from discussing the case with the news media is whether there is a “reasonable likelihood” that information concerning the case would make it difficult to impanel an impartial jury and would tend to prevent a fair trial. (*Younger v Smith* (1973) 30 CA3d 138, 160.)

Court orders may also restrain a wide range of persons besides the parties. (*Sheppard v Maxwell* (1966) 384 US 333, 86 S Ct 1507 (witnesses, court staff, and law enforcement officers coming under court’s jurisdiction).)

Defendant in this case asks this Court to ensure __ *[his/her]* __ right to a fair trial by ordering all attorneys, parties, investigators, witnesses, court officials (including, but not limited to, clerks, reporters, and bailiffs), and law enforcement officials connected with this case, not to discuss any of the following:

1. Statements concerning the existence or possible existence of any documents, exhibits, or other demonstrative evidence, the admissibility of which may have to be determined by the Court;

2. Any purported extrajudicial statements of the defendant;

3. Statements as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter;

4. The release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court;

5. An opinion or comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence of the defendant;

6. Any statement as to the identity of any prospective witness, or his or her probable testimony, or the effect thereof; or

7. Any opinions or comments as to the nature, source, effect, or admissibility of any testimony, or probable testimony in any pretrial proceeding related to this matter.

__ [Explain factually why the above protective order is required, e.g., because the prosecution has released information about otherwise inadmissible evidence to the press. Cite relevant cases.] __

THE COURT SHOULD SEAL THE RECORD OF THE PRELIMINARY HEARING TO PREVENT IRREPARABLE DAMAGE TO THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL

The trial court must seal the transcript of the preliminary hearing when the defendant shows that (1) there is a substantial probability of irreparable damage to the defendant's right to a fair and impartial trial, (2) there is a reasonable likelihood of identifiable prejudice to the defense, and (3) no other methods will reasonably ensure a fair trial. (*Cromer v Superior Court* (1980) 109 CA3d 728 (sealing portion of preliminary hearing transcript until trial).)

__ [Specify why the above tests are met under the facts of your case. Include any other relevant cases.] __

CONCLUSION

For the above-stated reasons, the defendant asks this Court to close the preliminary hearing to the press and public; seal the preliminary hearing transcript; and issue a protective order directed to the parties, their attorneys, court personnel, and others connected with the case.

Date: _____

Respectfully submitted,
 __[Signature of attorney]__
 __[Typed name]__
 __[Title if in public defender
 office]__
Attorney for __[name of
 defendant]__

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF _____

**PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
 __[Name(s)]__,
Defendant(s)

Dept. __[number]__
 No. __[case number]__
**[PROPOSED] PROTECTIVE
ORDER**

GOOD CAUSE HAVING BEEN SHOWN, IT IS THE ORDER of this Court that no member of the press or public (outside of those persons permitted to attend under Penal Code section 868) will be allowed to be present at any pretrial proceeding in this matter without the express permission of this Court, unless the proceeding is declared by this Court to be an open or public session.

IT IS THE FURTHER ORDER of this Court that this order applies to the following persons: parties to this action; attorneys connected with this case as defense counsel or as prosecutors; other attorneys; judicial officers or employees; witnesses; public officials, including

but not limited to the chief of police and the sheriff; and any agent, deputy, or employee of the persons just described.

IT IS THE FURTHER ORDER of this Court that the persons described above not to do the following things:

1. Release or authorize the release for public dissemination of any purported extrajudicial statement of the defendant in this case; release or authorize the release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court;

2. Make any statement for public dissemination as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the Court;

3. Express outside of court an opinion or make any comment for public dissemination on the weight, value, or effect of any evidence as tending to establish guilt or innocence of the defendant;

4. Make any statement outside of court as to the nature, substance, or effect of any testimony that has been given, except as set forth below;

5. Issue any statement concerning the identity of any prospective witness, or his or her probable testimony, or the effect thereof; or

6. Make any out-of-court statement as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter; however, a witness may discuss any matter with any attorney of record or agent thereof.

This order does not apply to any of the following items:

1. Factual statements concerning the accused's name, age, residence, occupation, and family status;

2. The following specific circumstances of the arrest: the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation;

3. The nature, substance, and text of the charge;

4. Quotations from, or any reference without comment to, public records of the court in the case, or to other public records or communications previously disseminated to the public;

5. The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session;

6. A request for assistance in obtaining evidence;

7. Any information about any person not in custody who is sought as a possible suspect or witness;

8. Any statement aimed at warning the public of any possible danger as to such person not in custody; or

9. A request for assistance in obtaining the names of possible witnesses.

This order is not intended to preclude any witnesses from discussing any matter in connection with the case with any of the attorneys representing the defendant or the People, or any representative of such attorneys.

IT IS A FURTHER ORDER OF THIS COURT that the transcript of the preliminary hearing in this matter be sealed.

The above orders are to remain in effect until further order of this Court.

Date: _____

_____[Signature of Judge]____

_____[Typed name]____

Judge of the Superior Court

Comment: The standard for closing a preliminary hearing at the defendant's request is met if there is a substantial probability that an open hearing would offset the right to a fair trial. *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13, 106 S Ct 2735. See also Pen C §868.

A party seeking to close a hearing must give adequate notice to the media. *Tribune Newspapers W., Inc. v Superior Court* (1985) 172 CA3d 443. In cases of interest to the media, they will usually send their own lawyers to argue against the defense motion. Some of the main areas of attack on a defense motion for a protective order include: the prosecution's right to a public hearing (see Crim Law §14.13); the existence of a reasonable

alternative (see *Ortega v Superior Court* (1982) 135 CA3d 244); the defendant's failure to meet the particular burden involved because, *e.g.*, the publicity is factual or has subsided (see Crim Law §14.14).

Cross-Reference: For discussion of motions to close the preliminary hearing, seal the transcript, and issue a protective order, see Crim Law §§8.21–8.22, chap 14. See also Crim Law §15.7 for discussion of the nature and extent of news coverage as it relates to arguments for venue change.

Forms for motions under Pen C §995 to dismiss an information or to quash an indictment can be found in §§13.1–13.2.

§8.2 B. Prosecution Memorandum in Opposition to Defendant's Motion to Close Preliminary Hearing, Seal Reporter's Transcript of Preliminary Hearing, and Issue Protective Order

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

The People oppose the defendant's motion to close the preliminary hearing, seal the preliminary hearing transcript, and for a protective order on the ground that the defense has not produced sufficient evidence to meet any of the legal tests involved.

The defendant, __[name of defendant]__, relies on the extent and nature of publicity to date as the reasons for each of __[his/her]__ requests. The mere fact that there is publicity about a case, however, is not enough to require any of the requested orders. The United States Supreme Court acknowledged in *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 554, 96 S Ct 2791, that

pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity....

The People request that the Court review the publicity __[attached to this opposition memorandum/attached to the defense motion/lodged

with the court]___. The news coverage of this case has been ___[describe factors indicating that the publicity will not affect the defendant's right to a fair trial, e.g., the news coverage is factual, or has diminished over time. Include discussion of cases relevant to the facts of your case]___.

Implicit in the defendant's allegation that pretrial publicity mandates a protective order such as sealing of the transcript is an allegation that the people of _____ County (the jury pool from which all defendants' triers of fact will be drawn) are so gullible as to be influenced by a few column inches of newspaper copy. This unspoken premise is an insult to the intelligence and integrity of the people of this county.

___[If a case was transferred to your county from another county and there is a published case discussing why your county was considered a fair venue, discuss that case. See the chart in *California Criminal Law Procedure and Practice* §15.39 (Cal CEB) for information on particular change of venue cases. An example of such an argument follows.]__

The character of this county was recognized in *People v Barger* (1974) 40 CA3d 662, 670, in which the Court opined that Alameda County is a "populous county with a heterogeneous and cosmopolitan population [which] in itself is a factor which indicates the possibility of securing jurors unaffected by pretrial publicity [citations]."

CONCLUSION

The People submit that an examination of the "extent," "tone," and objectivity of news coverage of this case, given the quality of the people of this county, will reveal that the defendant has failed to present an adequate evidentiary showing to support any of the standards involved in the defendant's requests. Accordingly, the People urge the Court to deny the defendant's motion to close the preliminary hearing, seal the transcript, and for a protective order.

Date: _____

Respectfully submitted,
 ___[Name of District Attorney]___
District Attorney
 ___[Signature of deputy district attorney]___
 ___[Typed name]___
Deputy District Attorney

Comment: See Comment in §8.1.

Cross-Reference: For discussion of motions to close the preliminary hearing, seal the transcript, and issue a protective order, see Crim Law §§8.21–8.22, chap 14. See also Crim Law §15.7 for discussion of the nature and extent of news coverage as it relates to arguments for venue change.

Forms for motions under Pen C §995 to dismiss an information or to quash an indictment can be found in §§13.1–13.2.

Grand Jury

I. OVERVIEW

- A. Motion to Quash Indictment Based on Error in Grand Jury Composition §9.1
- B. Motion to Dismiss Indictment (Pen C §939.71) §9.2
- C. Request to Grand Jury and Prosecution to Consider Exculpatory Evidence §9.3

I. OVERVIEW

§9.1 A. Motion to Quash Indictment Based on Error in Grand Jury Composition

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court dismiss the indictment in this case because __[summarize error]__. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,
 __[Signature of attorney]__
 __[Typed name]__
 __[Title if in public defender office]__
Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

__[Summarize your argument in two to three sentences.]__

STATEMENT OF FACTS

__[Specify the charges brought against the defendant by the grand jury, and the date they were brought.]__

__[Next, describe the facts concerning the alleged error in the composition of the grand jury. Attach as exhibits declarations or other papers to support each allegation. A very brief example follows; in most cases a demographic expert's testimony would be included, and extensive expert testimony would be taken at the hearing on the motion. See the Comment at the end of this motion.]__

The Franklin County Grand Jury that returned this indictment was composed of 19 members. They were all white males. (See Exhibit One, declaration of __[name of defense counsel]__.) The population of Franklin County is 55 percent females and 45 percent males. The racial breakdown is: 56 percent Caucasian; 24 percent African-American; 15 percent Hispanic; 3 percent Asian; and 2 percent Native American. (See Exhibit Two, 1990 census figures for Franklin County.)

[Continue]

ARGUMENT

__[Some of the main arguments concerning error in the composition of the Grand Jury follow. Use any that are relevant.]__

THERE WAS INTENTIONAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

__[Give the composition of the Grand Jury, the composition of the county residents, and the basis for claiming intentional discrimination. See

*U.S. Const amends VI, XIV; People v Newton (1970) 8 CA3d 359, 388 (grand jury must be free from “purposeful discrimination”); Vasquez v Hillery (1986) 474 US 254, 106 S Ct 617 (grand jury must be free from intentional discrimination, which is violation of right to equal protection). See also People v Bell (1989) 49 C3d 502, 524 (statistical evidence regarding petit jury not sufficient if selection process neutral; systematic exclusion must be shown).]*__

THE GRAND JURY THAT FOUND THE INDICTMENT IN THIS CASE DID NOT REPRESENT A FAIR CROSS-SECTION OF THE COUNTY, WHICH IS A VIOLATION OF THE SIXTH AMENDMENT

__*[Give the composition of the Grand Jury, the composition of the county population, and the basis for claiming violation of the fair cross-section requirement. Relevant authorities include US Const amends VI, XIV; Duren v Missouri (1979) 439 US 357, 364, 99 S Ct 664 (absence of fair cross-section in petit jury due to nonpurposeful exclusion is violation of due process and Sixth Amendment right to trial by impartial jury); People v Corona (1989) 211 CA3d 529, 536 (same); People v Superior Court (Dean) (1974) 38 CA3d 966, 971 (in formulating panel for grand jury, officials have affirmative duty to develop and pursue procedures aimed at achieving fair cross-section; cited in People v Harris (1984) 36 C3d 36, 59). The rules are the same for grand juries as for petit juries (Carter v Jury Comm’n (1970) 396 US 320, 330, 90 S Ct 518; People v Newton (1970) 8 CA3d 359, 388), and the same for the State of California as for the federal courts (Carter v Jury Comm’n, supra).]*__

THE DEFENDANT NEED NOT BE A MEMBER OF THE UNDERREPRESENTED GROUP TO CHALLENGE ITS LACK OF REPRESENTATION ON THE GRAND JURY

The defendant is not required to be a member of the group that is underrepresented on the grand jury that found an indictment in __*[his/her]*__ case in order to challenge that underrepresentation. (*Peters v Kiff (1972) 407 US 493, 92 S Ct 2163; People v Estrada (1979) 93 CA3d 76, 95 n15.*)

CONCLUSION

The defendant asks the court to quash the indictment against __*[him/her]*__ for the above-stated reasons.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__Attorney for __[name of
defendant]__

Comment: Any relevant declarations, affidavits, or other documents needed to support the motion should be attached as exhibits. See §§18.3–18.4 on declarations and affidavits and §1.25 on exhibits.

A challenge to the composition of the grand jury is made in the superior court through a motion to quash the indictment. *Vasquez v Hillery* (1986) 474 US 254, 106 S Ct 617 (defendant had made unsuccessful motion to quash indictment in California superior court; U.S. Supreme Court reversed based on systematic exclusion of African Americans from grand jury). See, e.g., *People v Romero* (2012) 204 CA4th 704.

NOTE► The challenge in the trial court is *not* made as a Pen C §995 motion, because extensive evidence must be taken and §995 review is almost always based exclusively on the record of the grand jury proceedings.

At the hearing on the motion, the defense first puts on evidence to prove a prima facie case. See *People v Navarette* (1976) 54 CA3d 1064 (discussion of evidence presented in support of motion based on underrepresentation of women). The defense commonly relies on census figures to show the percent of the underrepresented group in the county and on testimony from the jury commissioner (or other county official responsible for grand jury selection procedures) to show what criteria are used and how they are applied. An expert is frequently used to provide a demographic analysis. See discussion in *In re Rhymes* (1985) 170 CA3d 1100. Statistical evidence of a disparity alone does not demonstrate that the underrepresentation was due to systematic exclusion: The disparity must be the result of an improper feature of the jury selection process. See, e.g., *People v Romero* (2012) 204 CA4th 704.

If a prima facie case is shown, the burden shifts to the prosecution to rebut it. *Castaneda v Partida* (1977) 430 US 482, 97 S Ct 1272.

To prove a prima facie case in the trial court, the following requirements must be met (*Castaneda v Partida*, *supra*):

- The procedure involved resulted in substantial underrepresentation of an identifiable group over a period of time.

- The underrepresented group is a recognizable, distinct class.
- The group has been singled out for different treatment under laws as written or as applied.
- If the procedure for selecting grand jurors is neutral on its face, the defense must identify some constitutionally impermissible application of the law that is the probable cause of the disparity.

Motions attacking the composition of the grand jury are complicated and voluminous. Defense counsel may obtain information on locating and obtaining copies of such motions through California Attorneys for Criminal Justice, which can be contacted through its website at <http://www.cacj.org>. Prosecutors can obtain information from the California District Attorneys Association, which can be contacted through its website at <http://www.cdaa.org>.

Cross-Reference: For further discussion of challenges to the composition of the grand jury, see Crim Law §9.5.

§9.2 B. Motion to Dismiss Indictment (Pen C §939.71)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court dismiss the indictment in the above-titled case because the prosecution failed to inform the grand jury of exculpatory evidence of which it was aware, as required by Penal Code section 939.71, thereby preventing the grand jury from exercising its duties under Penal Code section 939.7. That failure has resulted in substantial prejudice and is, therefore, grounds, under Penal Code section 939.71, for dismissal of the portion of the indictment related to that evidence. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____**Attorney for** ____[name of
defendant]____

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_____[Summarize your argument in two to three sentences.]____

STATEMENT OF FACTS

_____[Summarize the facts concerning the crime(s) charged as brought out in testimony before the Grand Jury. Follow each summary of particular testimony with a parenthetical citation to the page (and line, if you wish) of the Grand Jury transcript on which that testimony may be found.]____

[Example]

On the morning of June 14, 2004, David Jones was notified by the maid that the television was missing from Room 24 of the Villa Motel, of which Mr. Jones is the manager. On entering the room, Mr. Jones found that the window had been forced open and a television was missing. (RT 5: 3–10)

_____[List the charges that were found against the defendant by the Grand Jury, and on what date.]____

EXCULPATORY EVIDENCE

_____[Describe whatever exculpatory evidence was available to the prosecutor but not presented to the prosecution. Cite to where the exculpatory evidence is memorialized; also attach a copy as an exhibit, and cite to that copy as well. Sources of such information might include police reports, declarations from defense investigators who interviewed witnesses who

said they gave particular information to the prosecution, and testimony from an earlier hearing in the same case if it has been dismissed before. If you sent information to the prosecution and requested that the Grand Jury be made aware of it, attach a copy as an exhibit.]_ _

ARGUMENT

THE PROSECUTION IS REQUIRED TO INFORM THE GRAND JURY OF EXCULPATORY EVIDENCE OF WHICH IT IS AWARE

The prosecution is required to inform the Grand Jury of any exculpatory evidence of which it is aware. (Penal Code section 939.71.) Although Penal Code section 939.71 does not define “exculpatory evidence,” it is expressly intended to codify the holding in *Johnson v Superior Court* (1975) 15 C3d 248, which described such evidence as evidence that tends to explain away the charges and as evidence that reasonably tends to negate guilt (*Cummiskey v Superior Court* (1992) 3 C4th 1018, 1033).

DISMISSAL IS THE REMEDY FOR THE PROSECUTION’S FAILURE TO INFORM THE GRAND JURY OF EXCULPATORY EVIDENCE OF WHICH IT IS AWARE WHEN THAT FAILURE RESULTS IN SUBSTANTIAL PREJUDICE

The prosecution’s failure to inform the Grand Jury of exculpatory evidence of which it is aware is grounds for dismissal if that failure results in substantial prejudice. (Penal Code section 939.71.)

THE PROSECUTION WAS AWARE OF EXCULPATORY EVIDENCE THAT WAS NOT DISCLOSED TO THE GRAND JURY

_ _ [*Describe what evidence not disclosed to the grand jury was available to the prosecution and why it was exculpatory. Detail how the prosecution was aware of it*]_ _.

SUBSTANTIAL PREJUDICE RESULTS WHEN IT IS REASONABLY PROBABLE THAT A RESULT MORE FAVORABLE TO THE DEFENDANT WOULD HAVE BEEN REACHED IF THE GRAND JURY HAD BEEN INFORMED OF THE EXCULPATORY EVIDENCE

The test for assessing substantial prejudice under Penal Code section 939.71 is whether, evaluating the entire record, it is reasonably probable that a result more favorable to the defendant would

have been reached if the exculpatory evidence had been disclosed to the grand jury. *Berardi v Superior Court* (2007) 149 CA4th 476.

THE FAILURE TO DISCLOSE EXCULPATORY EVIDENCE RESULTED IN SUBSTANTIAL PREJUDICE

__ [Describe how failure to disclose the exculpatory evidence resulted in substantial prejudice] __.

CONCLUSION

The indictment should be dismissed, on the basis of the prosecution's failure to inform the Grand Jury of exculpatory evidence of which it was aware, resulting in substantial prejudice.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

Comment: The defendant is entitled to discovery of both testimonial and nontestimonial portions of grand jury proceedings to prepare a motion to dismiss the indictment. *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403. The court in *Mouchaourab* construed Pen C §939.71 as one of the “express statutory provisions” that authorizes discovery under Pen C §1054(e). A sample informal discovery motion and a sample motion to compel discovery are in chap 11.

NOTE► This motion is not made as a Pen C §995 motion, because evidence must be taken; rather it is made as a motion to dismiss the indictment under Pen C §939.71. You should check local practice concerning the procedures followed for such motions.

If the defense is aware of the existence of exculpatory evidence that is persuasive enough to “explain away the charges” (see Pen C §939.7), the defense may wish to submit a letter to the grand jury and to the prosecution informing them of the existence of exculpatory evidence. See §9.3.

The opposition arguments that may be made by the prosecution include the following:

- The proposed evidence was not exculpatory; the evidence was not within the reach of the grand jury (Pen C §939.7).
- The grand jury was aware of the evidence but did not ask the prosecution to produce it.
- The prosecution *did* tell the grand jury of the exculpatory evidence.
- The failure to present the proposed evidence did not result in substantial prejudice.

See *People v Thorbourn* (2004) 121 CA4th 1083, 1090.

Substantial prejudice is demonstrated when, evaluating the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached if the exculpatory evidence had been disclosed to the grand jury. *Berardi v Superior Court* (2007) 149 CA4th 476.

Any relevant declarations, affidavits, or other documents needed to support the motion should be attached as exhibits. See §§18.3–18.4 on declarations and affidavits and §1.25 on exhibits.

Cross-Reference: On the prosecutor's obligation to present exculpatory evidence to the grand jury, see Crim Law §9.19.

§9.3 C. Request to Grand Jury and Prosecution to Consider Exculpatory Evidence

[Attorney's letterhead]

To: __[Name of grand jury foreman or forewoman and of District Attorney]__

__[Address]__

__[Name of District Attorney]__

__[Address]__

Re: __[Name of defendant]__

Dear __[Name of grand jury foreman or forewoman and of District Attorney]__:

__[State name of defendant and describe case sufficiently to identify it to the recipients of the letter]__.

__[Describe the grand jury's obligations and rights when it receives notice of exculpatory evidence (Pen C §§939.7, 939.71)]__.

[Example]

Under Penal Code section 939.71, the prosecution has a duty to inform the Grand Jury of any exculpatory evidence of which the prosecution is aware. For purposes of this code section, exculpatory evidence includes evidence that tends to explain away the charges and evidence that reasonably tends to negate guilt. (Penal Code section 939.71(b); *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1033.) The Grand Jury must weigh all the evidence submitted to it and, when it has reason to believe that other evidence within its reach will explain away the charge, it must order the evidence to be produced. (Penal Code section 939.7.) Copies of these code sections are attached to this letter.

__ [Describe in separate paragraphs each piece of evidence that is exculpatory. You might follow a formula for each piece of evidence: First, describe it; second, tell why it is exculpatory; third, state that a copy is attached to the letter, if that is the case (if a copy is not attached, Pen C §939.7 requires that you explain why the evidence is within the reach of the grand jury); fourth, if the prosecution will have to subpoena (duces tecum) a witness or evidence, give sufficient information (such as addresses and phone numbers) for that to easily be accomplished.] __

__ [Summarize why no indictment should be found. Offer to provide any further information needed either by the grand jury or the prosecution] __

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

Comment: Both the prosecutor and the grand jury foreperson may be addressed in the same letter, and two originals prepared, signed, and sent (so that each recipient knows that the other has a copy). This is not a court paper and so is not served and filed. Because of the importance of the information and the usual need to act quickly, however, the defense may wish to have these letters delivered by messenger. Because the defense may have to prove at a later time that the letter was delivered to the prosecution and to the grand jury, and possibly prove the date of delivery, the defense should have proof of service. It is common either to have those receiving it sign for receipt, or to send the letter certified mail, return receipt requested.

Defense counsel must weigh several factors before deciding whether to send favorable defense information to the grand jury and the prosecution. First, if you are not experienced with this particular grand jury, find out from local practitioners whether it is a “rubber stamp” for the prosecution. Consider whether any of the favorable information is privileged or work product or would not otherwise be discovered by the prosecution. Decide whether the information really satisfies the Pen C §939.7 condition that it “will explain away the charge.”

Defense counsel who wants to try to reach a disposition that does not involve the filing of an indictment may make an appointment to personally present the exculpatory evidence to the prosecutor before the grand jury has had the opportunity to find an indictment.

The prosecution has no obligation to disclose nonexculpatory evidence to the grand jury. If the grand jury also received a copy of the defense letter, the prosecution may want to ask them if they want to take evidence on the information contained in the defense letter.

10

Client Interview

I. OVERVIEW

A. Client Interview Form §10.1

I. OVERVIEW

§10.1 A. Client Interview Form

CLIENT INTERVIEW FORM

Date _____

Name _____

Address _____

Telephone _____

(Number, street, city, and zip code)

Birthdate _____

Social Security No. _____

E-mail Address _____

Education _____

(Highest grade completed) _____ (School names) _____

Vocational Training _____

(Skill) _____ (School name) _____

Driver's License No. _____

Issuing State _____

Auto Model/Make _____

Automobile License No. _____

Have you contacted another attorney about this case? Please provide details.

Do you have any outstanding warrants for your arrest? Please provide details.

Is English your native language? _____ If not, what is? _____ Do you need an interpreter? _____

Are you a U.S. citizen? _____ If not, what is your immigration status?

Do you have other cases pending? _____

Are you now on probation, parole, or supervised release? _____

If you are on probation, parole, or supervised release, please list the name and telephone number of your probation or parole officer: _____

List all prior arrests and whether convicted or not.

Offense	Arresting Agency	Date	Disposition
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

FAMILY

Name	Address	Telephone	Birthdate	Where Employed
Father				

Mother (Maiden)

Stepfather

Stepmother

Name	Address	Telephone	Birthdate	Where Employed
Brothers/Sisters				

101

101

Children/Stepchildren

PREVIOUS RECORD

Have you ever been referred to adult or juvenile probation or parole?

Agency

Location

Date

Have you ever been in a jail, prison, or mental hospital for juveniles or adults?

Name of Institution

Date

Why were you there?

Important: Give complete names and mailing addresses for the next three categories.

MARITAL HISTORY

Married to:

Date Married

Date Sep/Div

(Spouse's current address/telephone)

(Spouse's current employer/telephone)

EMPLOYMENT HISTORY (List present or last employment first)

From/To	Name of Employer	Type of Business
---------	------------------	------------------

(Position held/Salary)

(Address)

(Telephone)

From/To	Name of Employer	Type of Business
---------	------------------	------------------

(Position held/Salary)

(Address)

(Telephone)

LIST PERSONAL REFERENCES (Persons who know you other than relatives)

Name	Address	Telephone
------	---------	-----------

DESCRIPTION OF CHARGED OFFENSE:

[This space is left blank for your attorney to fill out.]

THE ARREST: SEARCHES; STATEMENTS TO POLICE: Did anything unusual happen when you were arrested? Were you, anyone with you, or any place searched? Did the police take anything? Did you make a statement to the police? What were the contents of your statements?

PHYSICAL, MENTAL, EMOTIONAL, MARITAL, DRUGS, AND/OR ALCOHOL PROBLEMS: Have you had a problem in any of the above areas? Yes ____ No ____

If yes, please explain: _____

Are you currently receiving medical treatment or are you seeing a counselor or therapist? Yes ____ No ____

Name _____

Telephone _____

Address _____

WITNESSES: Please list all the names, addresses, and telephone numbers of people who witnessed the alleged crime or who can give information about it.

Name

Address

(Date)

(Signature of client)

If someone helped you to complete this questionnaire, please write that person's name, address, and telephone number below.

(Name)

(Address)

(Telephone)

Comment: You can have the client fill out the above form before the interview begins or can use it to organize the interview and elicit the information during the interview. To protect the attorney-client privilege, you or your secretary should caution the client not to share the form with any other person or to bring any other person to the interview unless an interpreter is required.

Cross-Reference: Additional information can be found in California Criminal Law Procedure and Practice, chap 10 (Cal CEB), and in Crim Law §§1.8 (first interview), 1.9 (jail kit), 3.13 (interviewing the client), 3.14–3.18 (fees and retainer agreements), 3.20–3.22 (accepting employment), and 32.12 (examples of possible defenses).

Discovery

I. OVERVIEW

- A. Informal Defense Discovery Request **§11.1**
- B. Defense Motion to Compel Discovery **§11.2**
- C. Defense Motion for Sanctions **§11.3**
- D. Informal Prosecution Discovery Request **§11.4**
- E. Opposition to Prosecution Discovery Request **§11.5**
- F. Prosecution Motion to Compel Discovery **§11.6**
- G. Prosecution Motion for Sanctions **§11.7**
- H. Motion for In Chambers Appointment of Defense Expert **§11.8**
- I. Defense Motion to Preserve and Copy Tape (*Harvey/Madden* Motion) **§11.9**
- J. Defense Motion for Transfer of Evidence for Retesting **§11.10**
- K. Defense Motion to Dismiss Because of Destruction or Loss of Evidence (*Trombetta/Youngblood* Motion) **§11.11**
- L. Defense Motion for Discovery of Police or Custodial Officer Conduct (*Pitchess* Motion) **§11.12**
- M. Defense Motion for Discovery of Victim's Violent Conduct **§11.13**
- N. Defense Ex Parte Motion for Production of Booking Photo or Latent Fingerprints **§11.14**
- O. Request for Disclosure of Juvenile Case File (Judicial Council Form JV-570) **§11.15**
- P. Acknowledgment of Discovery **§11.16**
- Q. Motion for Conditional Examination **§11.17**

I. OVERVIEW

§11.1 A. Informal Defense Discovery Request

[The informal request may be made by letter, or may be in the form of a court document so that it can be filed. The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see

§§1.4–1.10.]

TO __[NAME]__, DISTRICT ATTORNEY OF _____ COUNTY:

NOTICE IS HEREBY GIVEN that I presently represent defendant, __[name]__, who is charged with violation of __[state charges]__ in Docket No. __[number]__. Defendant is to next appear in Department __[number]__ of the __[name of court]__ on __[date]__.

Under Penal Code section 1054.5(b), I hereby request that on or before the date of that appearance, __[give an alternative date if that is desired]__, you provide me with copies of the following information, or provide me with the opportunity to review all of the following information:

[The main items of information to be requested are listed below; select the ones you want, delete the rest, and add any others relevant to your case.]

The names, current addresses, and telephone numbers of all witnesses to be called to testify against the defendant at trial and of all percipient witnesses and potential witnesses, whether or not the prosecution intends to call the witness to testify against the defendant at trial. (See Penal Code sections 1054.1(a), 1054(e); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194. See also *In re Littlefield* (1993) 5 C4th 122.)

All statements or utterances by the defendant __[or a codefendant]__, oral or written, however recorded or preserved, whether or not signed or acknowledged by the defendant __[or codefendant]__. (Penal Code section 1054.1(b), (e); *Brady v Maryland, supra*.)

The content of any statements made in the defendant's presence while being interrogated by law enforcement that were intended or might reasonably be expected to have the effect of encouraging the defendant to give a statement about the offense to the police. (*People v Haydel* (1974) 12 C3d 190; *Napue v Illinois* (1959) 360 US 264, 79 S Ct 1173.)

All notes of observations of the defendant's physical appearance, emotional state, or sobriety by law enforcement personnel or their agents at or near the time of defendant's arrest. (See *People v Haydel, supra*.)

All physical evidence obtained in the investigation of the case against the defendant. (Penal Code section 1054.1(c), (e).)

All photographs, transparencies, slides, diagrams, motion pictures and videotapes of the scene of the alleged offense. (Penal Code section 1054.1(c), (e).)

All photographs, motion pictures, or videotapes of the defendant made at or near the time of defendant's arrest in this case. (Penal Code section 1054.1(c), (e).)

All photographs, videotapes, motion pictures, composites, or likenesses shown to witnesses and prospective witnesses in this case for the purpose of establishing the identity of suspects in the crime charged against the defendant, and all reports concerning the display of such. (Penal Code section 1054.1(c), (e).)

The names and addresses of each witness shown or attending a lineup involving the above-entitled case and the results of any such lineup. (Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.)

A copy of any police radio communication tape concerning the case. (See *People v Madden* (1970) 2 C3d 1017.)

Any record of criminal arrests or convictions of the defendant. (Penal Code section 1054.1(d)–(e).)

Any exculpatory evidence, information, documents, and other materials in the possession of, or that have come to the attention of, the District Attorney or of any police department involved in the investigation of the case against the defendant. (Penal Code sections 1054.1(e), 1054(e). See *Giglio v U.S.* (1972) 405 US 150, 92 S Ct 763; *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.)

Any record of criminal arrests or convictions (whether for felonies or misdemeanors) of any witness to be called to testify against the defendant. (Penal Code sections 1054.1(e), 1054(e); *People v Lang* (1989) 49 C3d 991; *People v Harris* (1989) 47 C3d 1047. See *People v Pensinger* (1991) 52 C3d 1210, 1271; *People v Santos* (1994) 30 CA4th 169.)

Any promises and/or inducements of any kind made by the prosecution to induce or encourage a witness to assist the prosecution in its investigation of the above-entitled case, or to induce a witness to

testify for the prosecution in the above-entitled case. (See Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.)

Any information relevant to impeachment of any witness that the prosecution intends to call at the trial, including any threats, promises, inducements, offers of reward or immunity, affirmative representations made or implied, and any record of convictions, or of pending charges, probation, or parole. (Penal Code sections 1054.1(e), 1054(e). See *Davis v Alaska* (1974) 415 US 308, 94 S Ct 1105.)

All records concerning the arrest of the alleged victim, complaints filed against the victim, or information concerning incidents of specific acts of aggression by the alleged victim, as well as the names, addresses, and phone numbers of witnesses to such acts. There is good cause to request such records because __[e.g., such records will show that alleged victim is prone to violence and victim's claims of self-defense lack corroboration or substance]___. (Penal Code section 1054.1(e). See *Hill v Superior Court* (1974) 10 C3d 812, 817 (upon showing of good cause, trial court has discretion to allow defendant to discover "rap sheet" of prosecution witness).)

The identity and whereabouts of any material informants. (Penal Code sections 1054.1(e), 1054(e).)

The names and addresses of all persons detained or arrested as suspects in the above-titled case, and any statement(s) made by such persons. (See Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.)

All written or recorded statements of witnesses who will testify at trial. (Penal Code section 1054.1(e)–(f).)

All written or recorded statements of percipient witnesses, whether or not they will be called to testify. (Penal Code sections 1054.1(e), 1054(e).)

Latent fingerprints lifted in the investigation of this case and photographs of such latent fingerprints, if any. (Penal Code section 1054.1(e); *Brady v Maryland*, *supra*.)

The known exemplars of fingerprints, if any, used for comparison with latent fingerprints lifted during the investigation of the alleged

offense. (Penal Code section 1054.1(e); *Brady v Maryland, supra.*) All photographs, videotapes, audiotapes, and movies concerning this case. (See Penal Code section 1054.1(e).)

All laboratory, technician, and other reports concerning the testing and examination of evidence concerning this case. (Penal Code section 1054.1(e)–(f).)

All reports of experts made in conjunction with this case, involving the results of physical or mental examinations, scientific tests, experiments, or comparisons that the prosecutor intends to offer in evidence at the preliminary hearing or at trial, and all reports of experts who reviewed the work of a prosecution expert who will testify at the preliminary hearing or at trial. (Penal Code section 1054.1(e)–(f).)

All notes and reports of police officers and investigators concerning the offense charged. This includes reports concerning all aspects of the case, e.g., the crime, the defendant's arrest, law enforcement activities and observations, and conversations with witnesses and potential witnesses. (Penal Code section 1054.1(e)–(f).)

All reports and notes of any law enforcement officer or investigator concerning the defendant and/or the above-entitled case that are maintained separately from the official file, e.g., as "current investigation files," "field identification notes," or "street files."

If Officer __[name]__ has not worked for the __[name of arresting agency for which officer works]__ for at least five years, and worked for another law enforcement agency within five years of the date of the arrest in the instant case, the name and mailing address of Officer __[name]__'s previous employer. (Penal Code section 1054.1(e); *Pitchess v Superior Court* (1974) 11 C3d 531.) All crime reports and arrest reports and other law enforcement reports, and any other information known to the __[name of department]__ Police Department tending to show that the victim, __[name]__, was involved in __[state crime, e.g., drug trafficking]__, in order to support defendant's statement __[tell what defendant's statement was, e.g., that the crime occurred in a dispute over drugs and was not a robbery]__.

Any evidence to be used in rebuttal of the defense case. (*Mal-donado v Superior Court* (2012) 53 C4th 1112.)

[Continue]

Defendant asks that this document be treated as a continuing request through the completion of trial.

Thank you in advance for your cooperation.

Date: _____

____[Signature of attorney]____

____[Typed name]____

____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

Received by: _____

Date: _____

Comment: An informal discovery request is required before court-ordered discovery may be requested. Pen C §1054.5(b). Counsel should always research the local court rules and standing orders for discovery. Many courts have a standing order for discovery that requires disclosure of the most commonly requested discovery items. For example, the San Francisco Superior Court Rules provide that “Disclosures required by Penal Code §§1054.1 and 1054.3 shall be made not later than the pre-trial conference.” San Francisco Ct R 16.9(A)(1). A standing order simplifies discovery practice, but it is often necessary to supplement it with a specific request for information pertinent to the case. For example, a standing discovery order might require the prosecution to turn over exculpatory material discoverable under *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194. However, a request specifying the specific information sought is necessary when the exculpatory value of the desired information is not readily apparent. See *In re Steele* (2004) 32 C4th 682, 701.

Informal requests should be made early so that counsel can use the requested materials in investigating the case and preparing for trial and to allow ample time for a formal discovery motion if there is any difficulty in obtaining discoverable materials through informal methods. See *People v Gutierrez* (2013) 214 CA4th 343 (prosecution’s duty to disclose exculpatory evidence under *Brady* applies to preliminary hearings). The prosecutor must be given 15 calendar days in which to comply with the informal request before court-ordered discovery may be sought. See Pen C §1054.5(b). When time limits are a problem, counsel should request an

order shortening time or whatever other order is necessary. See *Hobbs v Municipal Court* (1991) 233 CA3d 670, 696, disapproved on other grounds in *People v Tillis* (1998) 18 C4th 284, 295. A sample application for an order shortening time is in §18.10. A sample motion to compel discovery is in §11.2. A sample motion for sanctions is in §11.3.

How informal the informal discovery process is varies from jurisdiction to jurisdiction. It may be common practice in some courts to make informal discovery requests orally; in others, it may be common practice to format the informal request as a court document and filed with the clerk along with proof of service on the opposing party. Counsel should be aware of the practice in the court in which he or she is appearing regarding what type of request is preferred or required. However, it is important to remember that the informal request is a prerequisite for a motion to compel discovery. For this reason, some experienced attorneys strongly recommend preparing a written informal request that is as specific as possible, and which separately describes each requested item. If court intervention becomes necessary, the attorney can simply attach the informal discovery to his or her noticed request.

WARNING► Standing discovery orders and lists of standard discovery items, such as the list reproduced in this section, are useful, but it is also crucial for counsel to consider whether the facts of the particular case suggest the need for additional discovery and to add such items to the informal discovery request when appropriate. For example, when the defendant has been charged by indictment, the grand jury transcript, including nontestimonial material, is discoverable under Pen C §1054(e). See *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403. See also §9.2.

Some attorneys informally request discovery in a letter, sent by registered or certified mail, return receipt requested. This provides documentation of the fact that the request was made; however, it does not document the contents of the request. San Francisco requires parties to provide written receipts describing contents exchanged during discovery and time received. San Francisco Ct R 16.9(A)(2).

Serving and filing the request is the safest procedure. The filed document provides evidence of *what* was requested and may avert later questions about whether counsel made an informal request for specific items sought in a motion to compel discovery. The sample form provided here may be formatted as a court document (see Cal Rules of Ct 2.100–2.119; §§1.2–1.12) and filed with an attached proof of service.

Reasons that the prosecution may not give the defense various types of discovery include the following:

- The requested discovery is not required to be given to the defense by Pen C §§1054–1054.7. The prosecution will closely examine the request to see if it comports with statutory requirements, and may oppose any item arguably not covered under the statutory discovery scheme. The prosecution will usually want to narrow the scope of the request as much as possible.
- The requested discovery is work product as defined by CCP §2018.030(a). Pen C §1054.6.
- The requested discovery is privileged. Pen C §1054.6. In some cases, privileged information is not required to be disclosed at the time the witness is “designated” (e.g., pretrial, at the time discovery is usually requested) but may be required to be disclosed later if the witness in fact testifies at trial. See *Andrade v Superior Court* (1996) 46 CA4th 1609, 1613; *Rodriguez v Superior Court* (1993) 14 CA4th 1260.
- The requested discovery has to be obtained from third parties not working as part of the investigative or prosecutorial team for the district attorney. See Pen C §§1054(e), 1054.1, 1054.5(a); *People v Superior Court (Barrett)* (2000) 80 CA4th 1305, 1314. In that case, the defense can obtain the requested evidence directly from the source. *People v Webber* (1991) 228 CA3d 1146, 1167.
- Evidence claimed to be favorable to the defense under *Brady* does not fit the *Brady* requirements.
- Other formal proceedings for obtaining the requested evidence that should be followed, e.g., motion to disclose a nontestifying informant, or *Pitchess* motion.

The prosecution should make a record of when and what discovery is given to the defense in response to the informal request. If the district attorney complies with the informal discovery request from the defense, further discovery proceedings are unnecessary. If the district attorney does not comply, or does not completely comply, formal discovery must be pursued. When the district attorney complies with the informal request, counsel should make a memorandum of compliance for the file that describes what was received and when. The district attorney may require defense counsel to reply with a discovery inventory letter that describes each piece of discovery received from the prosecution and the date it was received. As

noted above, San Francisco local rules actually require that parties exchange receipts detailing contents exchanged during discovery and date of compliance. San Francisco Ct R 16.9(A)(2).

Certain types of discovery should be requested through separate motions, *e.g.*, *Pitchess* motions (see California Criminal Law Procedure and Practice §§11.19–11.24 (Cal CEB)), *Trombetta* motions (see Crim Law §§11.27–11.28), and motions to disclose the identity of a nontestifying informant (see Crim Law, chap 17). See Crim Law §11.2 for a list of the common special discovery motions; see the outline at the beginning of this chapter for a list of the special discovery motions included in this forms manual.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

§11.2 B. Defense Motion to Compel Discovery

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court compel discovery of the items previously requested informally of the prosecution on __[date]__, and not given to the defense. Those items are listed in the attached __[e.g., declaration of counsel]__. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

AN INFORMAL DISCOVERY REQUEST HAS ALREADY BEEN MADE OF THE PROSECUTION, AND __ [THERE WAS NO RESPONSE/ THE PROSECUTION DID NOT DISCLOSE ALL REQUESTED ITEMS]__

The defense is required to informally seek discovery at least 15 calendar days before asking for court-ordered discovery. (Penal Code section 1054.5(b).) In this case, the defense met that obligation. __ [Describe when and how discovery was requested. If the informal discovery request was a court form for standard discovery in criminal cases, state that.]__ A copy of that informal request is attached as Exhibit A. __ [Describe the prosecution's response, if any, e.g., the prosecution did not comply at all, or turned over some requested items, but not others. If there was partial compliance, tell where in the motion that is detailed, e.g., the items disclosed by the prosecution are set out in Exhibit B, defense counsel's notice of receipt of discovery, and in Exhibit C, the prosecution's compliance letter.]__

THE DEFENSE ASKS THE COURT TO ORDER THE PROSECUTION TO DISCLOSE TO THE DEFENSE THE ITEMS LISTED BELOW. ALL OF THEM WERE REQUESTED INFORMALLY OF THE PROSECUTION, BUT NONE HAVE BEEN GIVEN TO THE DEFENSE

[Describe what the defense is requesting in general, usually one of the following choices.]

[Option 1]

The defense requests that the court order the prosecution to disclose all items that were requested in the informal discovery request that is attached as Exhibit A, and that are described below.

[Option 2]

The prosecution did not disclose every item requested by the defense in its informal discovery motion (Exhibit A). The defense therefore requests that the court order the prosecution to disclose to the defense those items set out below, which were informally requested but not disclosed.

[Continue]

[Set out all items requested that have not been produced by the prosecution, with accompanying authority that supports their discovery. Be sure to list only the items not produced. A sample informal request is in §11.1. The main items to request follow. Delete any that do not apply, and add any additional ones relevant to your case. They may follow each other, as they do here, or each request may be put on a separate page.]

DEFENDANT'S STATEMENTS

All statements by the defendant, however recorded or preserved, whether or not signed or acknowledged by the defendant, whether made to police officers or to other people, and the names, addresses, and telephone numbers of any and all witnesses to the making of said statements. If such statements were oral, they shall be reduced to written form and provided to defense counsel. If any such statements were tape-recorded and/or videotaped, the defense shall be permitted to copy such videotape and/or tape-recording and, in addition, any transcript made thereof. Any notes of any such statements, utterances or memoranda shall be preserved, and a copy provided to the defense.

AUTHORITIES: Penal Code section 1054.1(b).

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

STATEMENTS USED DURING INTERROGATION OF DEFENDANT

All statements of any person that were shown, read, played, or paraphrased to the defendant during any interrogation conducted by law enforcement. The content of any statements made to the defendant or anyone else in the defendant's presence, which (a) were made in order to encourage the defendant to cooperate with the police and/or (b) might reasonably be expected to have the effect of encouraging the defendant to give a statement about the offense to the police.

AUTHORITIES: Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

OBSERVATIONS OF DEFENDANT AT AND NEAR TIME STATEMENT MADE

All memoranda or reports of observations made by police officers, or prosecution investigators and psychotherapists at or near the time of the arrest of the defendant, and at or near the time of the making of any statement, utterance, or memoranda by the defendant, concerning the defendant's physical appearance, emotional state or state of sobriety.

AUTHORITIES: Penal Code section 1054.1(e).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PHOTOS, ETC. OF SCENE OF CRIME

All photographs, transparencies, slides, diagrams, motion pictures, and videotapes of the scene of the alleged offense.

AUTHORITIES: Penal Code section 1054.1(c), (e).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

WITNESSES TO BE CALLED AT TRIAL

The names, current addresses, telephone numbers, and all statements, oral or written, of every prosecution witness whom the prosecution reasonably anticipates it is likely to call to testify at trial, including notes from interviews with these witnesses.

AUTHORITIES: Penal Code section 1054.1(a)

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

CRIMINAL RECORD OF WITNESSES TO BE CALLED AT TRIAL

For each witness who may be called to testify at trial, all records, including police reports, relating to any felony conviction, or any misdemeanor charge, any pending charges, any pending parole or probation, anywhere in California, both at the time of the alleged offense and presently pending. Also any docket numbers or CEN numbers generated by the incident giving rise to the report.

AUTHORITIES: Penal Code section 1054.1(d) (“existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial”); California Constitution article I, section 28(f); *People v Wheeler* (1992) 4 C4th 284; *People v Mickle* (1991) 54 C3d 140, 168; Evidence Code sections 452.5, 780, 788. See also *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PERCIPIENT WITNESSES

The names, current addresses, telephone numbers, and all statements, oral or written, of all persons who were percipient witnesses as herein defined, including notes from interviews with these witnesses, whether or not they are to be called to testify against the defendant at trial. The term “percipient” includes any witness to the charged offenses or incidents immediately attendant thereto, as well as a witness who perceived relevant details either before or after the commission of the charged offenses.

AUTHORITIES: Penal Code section 1054.1(a), (e), (f); *Brady v Maryland, supra*.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

REPORTS, RECORDS, AND NOTES ON WITNESSES

All reports, records and notes regarding the witnesses who will be called to testify at trial, or who were percipient witnesses to the charged offense(s), as described above, bearing on any such witness’s physical or psychological limitation on their ability to perceive, recollect or communicate concerning the subject matter of his

or her testimony; the witness's character for honesty or veracity or their opposites; the existence or nonexistence of any expressed bias, interest, or other motive in testifying; any admission of untruthfulness. Information concerning any hospitalization of the witness that would relate to a witness's mental or physical abilities to observe or recollect, or related to the subject matter of his or her proposed testimony. All notes and reports of observations of police officers and investigators concerning the state of sobriety at the time of the charged offenses of those witnesses.

AUTHORITIES: Penal Code section 1054.1(e); Evidence Code section 780; *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PRIOR VIOLENT ACTS OF VICTIM

Regarding the complaining witness, __[describe the complaining witness, including his or her name and as much other identifying information as possible, e.g., date of birth, physical description, sex, race]__, based on Penal Code section 1054.1(a), (d)–(f), and *Brady v Maryland*, *supra*, counsel requests:

1. All records concerning the arrest or conviction of the complaining witness for specific acts of aggression, together with the names and addresses of witnesses to such acts.

2. All records concerning any felony and misdemeanor convictions suffered by the complaining witness to impeach __[his/her]__ credibility.

3. All police reports made within the last five years in which the complaining witness reportedly assaulted or otherwise engaged in violent conduct against the defendant. (*Engstrom v Superior Court* (1971) 20 CA3d 240.)

4. All probation reports regarding the complaining witness made within the last five years. (Penal Code section 1203.05.)

5. Any and all criminal charges pending against the complaining witness in any county in the State of California.

6. The probationary status of the complaining witness in any county in the State of California.

7. The police reports for all arrests and convictions for criminal activity on the part of the complaining witness, as well as any docket numbers or CEN numbers generated by the incident giving rise to the report.

AUTHORITIES: California Const article I, section 28(f); *People v Wheeler* (1992) 4 C4th 284; *People v Mickle* (1991) 54 C3d 140, 168.

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

DOCUMENTS USED TO REFRESH RECOLLECTION

[Use this section in discovery motion submitted in superior court, after preliminary hearing has been held.]

All notes made by prospective witnesses relating to matters covered in their testimony at the preliminary examination and all documents used by a prosecution witness to refresh his or her memory at the preliminary examination or before trial.

AUTHORITIES: Penal Code section 1054.1(f).

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

PROSECUTION OFFERS TO DEFENDANT OR WITNESSES TO OBTAIN INFORMATION OR TESTIMONY

As to defendant and all witnesses who may be called to testify at the trial of the case and any and all persons who were percipient witnesses to the alleged offenses, whether or not they are to be called to testify at the trial of the case: any and all promises, inducements, offers of reward or immunity, plea agreements, or affirmative representations made or implied to such persons in an effort to obtain information or testimony as to the investigation and/or prosecution of the alleged offenses as charged in the information, and, as to such persons, any and all threats made or implied for a like purpose.

AUTHORITIES: Penal Code section 1054.1(e); Evidence Code section 780.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

LAW ENFORCEMENT REPORTS, ETC.

All reports, notes, documents, diagrams, memoranda, and records, however recorded or preserved, prepared by any police officer or at a police officer's direction in connection with this incident, including, but not limited to, the investigating officers' log, defendant's booking sheet, and defendant's arrest sheet. All notes made by any police officer in connection with this case shall be preserved and a copy provided to defense counsel. "Notes," as used above, include those in the official case file and, additionally, those outside the official file, such as "street files," "criminal investigation files," "field investigation notes," etc.

It is further requested that the prosecution immediately notify all police officers involved in this investigation to preserve any original notes that they may have made during this investigation.

AUTHORITIES: Penal Code section 1054.1(e)–(f); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194. (See discussion in the Comment at the end of this motion.)

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

OPPORTUNITY TO VIEW ALL EVIDENCE

An opportunity to view and examine all physical evidence obtained in the investigation of the charged offense, including a copy of all property record sheets, and copies of all photographs, motion pictures, videotapes, slides, or transparencies taken of any physical evidence and of the scene of the alleged offense, and copies of all photographs taken of the defendant at or near the time of the charged offense, including the booking photograph of the defendant.

AUTHORITIES: Penal Code section 1054.1(c).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

REPORTS AND RECORDS OF EXPERTS CONCERNING CASE

All reports and records of all chemical, biological, medical, criminological, laboratory, or other testing and examination of any physical evidence in this action, including, but not limited to, the victim's body, bodily fluids, and/or clothing, and the defendant's body, bodily fluids, and/or clothing. All reports and records of experts involving mental examinations of the defendant or a witness in the case. Copies of any notes, tape recordings, or any other records or documents used or completed in the course of such testing and examination. The name, address, and telephone number of each person who conducted or performed any such test, examination, or analysis. The name, address, and telephone number of any person who reviewed any such test, examination, analysis, or report for any expert opinion, with a copy of each person's report, evaluation, review and/or analysis. The curriculum vitae of any expert who conducted a test, wrote a report, or reviewed an expert's test or report in this case, who will testify as an expert at the preliminary hearing or at trial.

AUTHORITIES: Penal Code section 1054.1(e)–(f).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

STATEMENTS OF CODEFENDANTS

All statements of codefendant[s], oral or written, however recorded or preserved, whether or not signed or acknowledged by the codefendant.

AUTHORITIES: Penal Code section 1054.1(e); see Penal Code section 1054.1(b).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PHOTOS OF DEFENDANT AND IDENTIFICATION MATERIALS

All photographs, videotapes, motion pictures, composites, or likenesses, of any kind or form whatsoever, shown to any and all witnesses or prospective witnesses in this case for the purpose of establishing the scope of the knowledge of such witnesses or prospective witnesses, or for the purpose of establishing the identity of suspects in the alleged offenses as charged in the information; any and all such photographs and the likenesses shown to such individuals for the purpose of verifying the identification of any defendant; all reports and notes concerning display of any and all such photographs and the like; and the names, addresses, and telephone numbers of all persons shown such photographs and the like and any other persons present during such viewing.

AUTHORITIES: Penal Code section 1054.1(c), (f); *U.S. v Wade* (1967) 388 US 218, 87 S Ct 1926.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

DEFENDANT'S CRIMINAL RECORD HISTORY

The defendant's criminal record history, commonly referred to as a "rap sheet."

AUTHORITIES: See Penal Code sections 1054.1(d), 13300(b)(9).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PROPERTY SEIZED FROM DEFENDANT

The exact location of any property seized from defendant by warrant or process, including a specific description and inventory of such property; the circumstances of the search and seizure attendant to such taking; the names and official positions of law enforcement personnel, whether federal, state, or local, involved in said search and seizure, as well as the identities of any additional third persons who were present; a specification of items that were seized in addition to those belonging to, or alleged to belong to, defendant, including those alleged to belong to others; the precise time of each search and seizure; the exact beginning and ending time of the

search; the exact time of any arrests made during the search and the names, addresses, telephone numbers, and rank of the arresting officers, and the location of such arrest; the manner of entry involved in said search and seizure; any reports of visual surveillance of defendant, codefendants, or third parties by law enforcement officers conducted before any of the aforesaid searches.

AUTHORITIES: Penal Code section 1054.1(c), (e); *U.S. v Nolte* (ND Cal 1965) 39 FRD 359.

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

EVIDENCE FAVORABLE TO DEFENDANT (BRADY DISCOVERY)

Any evidence that would tend to exonerate the defendant (“*Brady*” discovery), minimize __[his/her]__ probable sentence, or that constitutes information that the defense might use to impeach or contradict prosecution witnesses. *Brady* discovery includes information that relates to the existence of evidence tending to suggest that someone other than the defendant committed __[the crime/any or all of the crimes]__ charged against the defendant. __[Add when applicable:]__ __[Brady discovery also includes any evidence that would tend to support a factor in either aggravation or mitigation as set forth in Penal Code section 190.3.]__

AUTHORITIES: Penal Code sections 1054.1(e), 1054.5(c); *Izazaga v Superior Court* (1991) 54 C3d 356, 378 (*Brady* disclosure required even though not included within Pen C §1054.1, because it is mandated by United States Constitution); *Napue v Illinois* (1959) 360 US 264, 79 S Ct 1173.

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

CONTINUING ORDER; COPIES OF ORDER TO BE GIVEN TO LAW ENFORCEMENT

The defendant requests that each of the above orders be continuing orders through the completion of trial, so that items granted that become available after the date of this order are to be made immedi-

ately available to defense counsel. This order is to be given to the prosecutor's investigator and to the police officer in charge of investigating this case, and those persons must immediately give all reports to the prosecutor, who must immediately give them to defense counsel.

AUTHORITIES: See Pen C §1054.7.

ORDER OF THE COURT: Granted _____ Denied _____

Ordered, with the following modification: _____

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

DECLARATION IN SUPPORT OF MOTION FOR DISCOVERY

I, ____[declarant's name]____; ____[most such declarations, including this one, are made by defense counsel]____, **declare under penalty of perjury that:**

1. I ____[state if you are in public office, e.g., am a deputy public defender and]____ **represent the defendant in the above-entitled action.**

2. **On information and belief, the records, documents, and information sought by this motion are in the actual and/or constructive possession of the District Attorney of _____ County.**

3. **The records, documents, and information sought by this motion** ____[except those previously provided,]____ **are not available to the defendant or** ____[his/her]____ **counsel in the exercise of due diligence.** ____[Describe why they are unavailable to the defense if that may be an issue]____.

4. The records and documents sought by this motion are necessary to help prepare the defense in this action. The requested discovery will be helpful to the defense case in the following ways:

__ [Specify how this information will be helpful, e.g., locating witnesses and physical evidence; preparing for the cross-examination and impeachment of witnesses to be called by the prosecution; assessing the credibility of witnesses to be called by the prosecution; assessing the credibility of defense witnesses; corroborating the testimony of defense witnesses; identifying the need for defense expert witnesses] __.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__ [Signature of declarant] __

__ [Typed name] __

__ [Title of declarant if in public office] __

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff

vs

__ [Name] __,

Defendant.

Dept. __ [number] __

No. __ [case number] __

**[PROPOSED] ORDER
COMPELLING DISCOVERY
(PEN C §1054.5)**

It appearing to this Court from the declaration of __ [name of declarant] __, __ [add title if in public office, e.g., Deputy Public Defender of Los Angeles County] __, **counsel for the defendant, that there are in your possession or under your control certain items relevant to this action, and good cause appearing therefor,**

IT IS HEREBY ORDERED that you make available to __ [name of attorney/the Public Defender of _____ County] __ **and/or** __ [his/her] __ **lawful representative within** __ [number] __ **days of this order each of the items checked off by this Court as granted or modified by**

this order as indicated on the attached paper(s). Failure to comply with this order may be punishable by contempt of court.

IT IS FURTHER ORDERED that this Order be deemed a continuing and ongoing order through the completion of trial, so that any items granted by this order, which are actually or constructively obtained by or become known to the District Attorney of _____ County or any of __[his/her]__ deputies, investigators, employees, or agents after initial compliance with this order has been made, shall also be made available immediately to defense counsel.

IT IS FURTHER ORDERED that copies of this order be given to the prosecutor's investigator, and to the law enforcement officer in charge of investigating this case, and that the prosecutor instruct them that the attached orders are continuing orders, and that law enforcement has a continuing obligation to give items covered by these orders to the prosecutor, who is then to give them to defense counsel.

Date: _____

__[Signature of Judge]__

__[Typed name]__

Judge of the Superior Court

Comment: If the prosecution has not complied with the informal request for discovery (see §11.1), the defense may move for court-ordered discovery. See Pen C §1054.5(b). This motion includes a proposed order. A copy of the informal request served on the prosecution should be attached to the motion as an exhibit, along with proof of service of the informal request, if any. If there is no proof of service, a declaration by the person who served the informal notice on the prosecution should be attached as an exhibit. See the sample declaration in §18.3.

Prosecution arguments against the motion to compel discovery might include the following:

- No informal request has been made.
- What was requested informally is different from items listed in formal motion.
- Fifteen days have not passed since the defense's informal request.
- The defense failed to follow the pretrial motion requirements of Cal Rules of Ct 4.111 (see Comment, §18.1).

- The informal request did not describe what was desired with enough particularity to enable the prosecution to know what is wanted (see *People v Prince* (2007) 40 C4th 1179, 1232; *People v Jackson* (1993) 15 CA4th 1197).
- The material requested is protected by the work product doctrine or by a privilege (Pen C §1054.6).
- The requested item is not within those required to be disclosed by Pen C §1054.1, by statute, or by the U.S. Constitution (Pen C §1054(e)).
- The defense has not complied with the prosecution's discovery request (Pen C §1054.5(b)).

PRACTICE TIP► If the prosecution has already disclosed material that the defense claims it did not disclose, the prosecution must be prepared to prove that disclosure. Common ways of handling discovery given to the defense so that compliance can later be proven are: having the defense sign and date the original of each item given them; and sending a copy of the list of what was sent, along with the date, to defense counsel and filing a copy of that list with the court. Although it is common to write a note in the file that discovery was given to the defense, and this practice may be the best course in many cases, it may cause problems in a case involving significant discovery items.

If the prosecution is concerned that the judge may order the production of information it believes is nondiscoverable, the prosecution should advance the date of the hearing on the defense motion so that it has time to seek a writ of prohibition. See 5 Witkin & Epstein, *California Criminal Law, Criminal Trial* §107 (4th ed). See also *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135; *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

§11.3 C. Defense Motion for Sanctions

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order sanctions against the prosecution under Penal Code section 1054.5 because the prosecution has failed to comply with the Court's __[date]__ discovery order. The defense requests that the following sanctions be imposed on the prosecution:

[Include the requests below that are relevant.]

The prosecutor in this case, __[name]__, be held in contempt;

The testimony of all prosecution witnesses related to the prosecution's failure to disclose be prohibited;

The presentation of real evidence related to the prosecution's failure to disclose be prohibited;

The trial of the case be continued;

The jury be advised of the prosecution's refusal to disclose;

The charges be dismissed;

__[Any other order necessary to enforce the provisions of Penal Code sections 1054–1054.7]__.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

This Court ordered the prosecution to disclose the items listed in the order attached as Exhibit A on __[date]__. The prosecution has not __[specify what has not been disclosed]__. The defense therefore moves for sanctions.

The appropriate sanctions in this case are __[Specify sanctions and explain why they are appropriate; remember that the testimony of a witness may be prohibited only if all other sanctions have been exhausted, and charges dismissed only if required by the U.S. Constitution (Pen C §1054.5(c))].__.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender office]____

Attorney for ____[name of defendant]____

Comment: A motion for court-ordered discovery (see §11.2) may be combined with a motion for sanctions if the prosecution has failed to comply with informally requested discovery. A copy of the discovery order should be attached to the motion for sanctions.

The prosecution may wish to request a review by the judge in chambers of the discovery requests with which it is not complying. See Pen C §1054.7; *Izazaga v Superior Court* (1991) 54 C3d 356, 382.

Cross-Reference: For discussion of sanctions, see Crim Law §11.17.

§11.4 D. Informal Prosecution Discovery Request

[The informal request may be made by letter, or may be in the form of a court document so that it can be filed. The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see

§§1.4–1.10.]

TO THE DEFENDANT ____[AND THE ATTORNEY FOR THE DEFENDANT]____:

The prosecution requests the discovery described below, which is required by Penal Code section 1054.3 to be disclosed to the prosecution by the defense:

1. "The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examination, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." (Penal Code section 1054.3(a)(1).)

2. The opportunity within the next __[number]__ days to view "[a]ny real evidence which the defendant intends to offer in evidence at the trial." (Penal Code section 1054.3(a)(2).)

This is a continuing request for the above information. If the information becomes available at a future time, the District Attorney by this request asks that it be immediately disclosed to __[him/her]__.

If the defense does not reply to this request within 15 calendar days of being served with it, the People will assume that the defense has refused to comply with the law, and the People will move for an order to compel disclosure and for other sanctions under Penal Code section 1054.5(b). However, the People will not move to compel disclosure if notified that the defense does not intend to call witnesses or offer any real evidence at trial. If the defense will not put on evidence at trial, please notify the assigned deputy district attorney at your earliest opportunity and within 15 calendar days so that a needless hearing can be avoided.

Date: _____

Respectfully submitted,
__[Name of District Attorney]__
District Attorney
__[Signature of deputy district attorney]__
__[Typed name]__
Deputy District Attorney

RECEIVED BY: _____

DATE: _____

Comment: Prosecutors often have standard forms that they use routinely to informally request discovery. It is also common for the prosecution to put a sentence requesting informal discovery at the bottom of the complaint, *e.g.*: “Under Penal Code section 1054.5(b), the People hereby informally request that defendant’s counsel provide discovery to the People as required by Penal Code section 1054.3.”

Another possible prosecution approach is to format the informal request as a “Request/Motion for Prosecution Discovery” and to include a notice of motion, discovery order, request for sanctions, and order concerning sanctions. The notice asks for discovery within 15 days and sets a court date at which a formal motion will be heard if discovery has not been received. The request/motion and accompanying papers are filed with the court. The court date can be one already set for another purpose or one specially set.

A formal prosecution motion to compel discovery is in §11.6.

Cross-Reference: For further discussion of discovery generally, see California Criminal Law Procedure and Practice, chap 11 (Cal CEB). On discovery by the prosecution, see Crim Law §§11.9–11.11A.

§11.5 E. Opposition to Prosecution Discovery Request

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT AND TO __[NAME]__, DISTRICT ATTORNEY OF ___ COUNTY:

SUMMARY OF ARGUMENT

Defendant opposes the prosecution’s motion for discovery on the grounds that:

[Summarize very briefly your main points; some examples are given below.]

The prosecution has failed to comply with the statutory discovery requirements.

The discovery sought violates the statutory protection against the disclosure of work product.

The discovery sought violates __[describe any federal constitutional violation]__.

The discovery sought violates the __[type of privilege]__ privilege.

The prosecution, having failed to comply with discovery itself, may not move to compel discovery from the defense.

STATEMENT OF FACTS

Defendant is charged with violating __[list offenses]__. On __[date]__, the prosecution filed a Motion To Compel Discovery, now set for hearing on __[date]__ in Department __[number]__ of this Court. The next court appearance is a __[specify what type of appearance, e.g., pretrial conference]__ set for __[date]__. The trial is set for __[date]__. __[Specify any other relevant facts, e.g., whether you gave any discovery to the District Attorney, and whether any was given to you by him or her.]__

ARGUMENT

[Some of the main opposition arguments to a prosecution discovery motion are set out below. Choose the one(s) applicable to your case, tailored to the facts of your case, and add any other arguments needed to oppose the motion.]

DISCOVERY OF DEFENSE INTERVIEWS OF PROSECUTION WITNESSES IS NOT PERMITTED BECAUSE THE DEFENSE DOES NOT PRESENTLY INTEND TO CALL THOSE WITNESSES

Penal Code section 1054.3(a)(1) requires the defense to disclose names, addresses, and statements of persons whom the defense “intends to call as witnesses at trial.” This requirement clearly does not apply when the defense interviews a prosecution witness, as long as the defense does not intend to call that witness at trial. Because “no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States” (Penal Code section 1054(e); see also Penal Code section 1054.5(a)), discovery of these interviews should not be allowed.

__[SPECIFY MATERIAL OR INFORMATION]__ IS PROTECTED WORK PRODUCT

Penal Code section 1054.6 states that “[n]either the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure....”

Code of Civil Procedure section 2018.030(a) provides that “[a]ny writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.”

[Describe the items you think are protected and explain why.]

__ *[General cases: Hickman v Taylor (1947) 329 US 495, 67 S Ct 385 (civil wrongful death action); U.S. v Nobles (1975) 422 US 225, 95 S Ct 2160 (extended work product doctrine to criminal cases and to product of attorneys’ agents); Upjohn v U.S. (1981) 449 US 383, 101 S Ct 677; Goldberg v U.S. (1976) 425 US 94, 96 S Ct 1338; Coito v Superior Court (2012) 54 CA4th 480; Rodriguez v Superior Court (1993) 14 CA4th 1260, 1270]__.*

__ *[Cases finding items absolutely privileged from disclosure as protected work product: summary of strategy session with experts intertwined with thoughts of attorney (Rico v Mitsubishi Motors Corp. (2007) 42 CA4th 807, 813 (paralegal’s report at attorney’s behest of strategy session between defense attorneys and defense experts, later edited by attorney to show thoughts and opinion of case, absolutely protected)); anticipated testimony of nonexpert witnesses (Long Beach v Superior Court (1976) 64 CA3d 65 (written summary of expected testimony falls within absolute privilege)); information that the attorney or the defendant may have imparted to an expert witness whose name and address is discoverable (Kenney v Superior Court (1967) 255 CA2d 106); an expert’s report that reflects, in whole or in part, the opinions, impressions, and thoughts of the attorney (National Steel Prods. v Superior Court (1985) 164 CA3d 476); the notes of a district attorney made concerning his or her impressions of a witness while interviewing the witness (statement of witness taken down by attorney, however, was not work product)]__.*

__ **[PORTIONS OF]__ THE EXPERT’S REPORT IN THIS CASE __[IS/ARE]__ PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

Penal Code section 1054.6 provides that “[n]either the defendant nor the prosecuting attorney is required to disclose any materials or information ... which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.”

A number of such provisions exist. Among them is the lawyer-client privilege embodied in Evidence Code section 954:

Subject to section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The privilege belongs to the client, and the attorney *must*, unless otherwise instructed, assert it for the client. (Business and Professions Code section 6068(e)(1) (attorney's professional responsibility to keep client confidences); *People v Vargas* (1975) 53 CA3d 516, 527 (attorney had duty to assert privilege in client's absence); *In re Navarro* (1979) 93 CA3d 325, 330 (attorney representing defendant on another matter had duty to assert privilege at preliminary hearing).)

__ *[Describe why the attorney-client privilege applies in your case]* __.

[Include the following paragraph if the communication concerned occurred with an agent of the attorney.]

The attorney-client privilege protection extends to communications between the client and any *agent* of the attorney, be it psychiatrist, doctor, investigator, secretary, interpreter, or clerk. (*City & County of San Francisco v Superior Court* (1951) 37 C2d 227; Evidence Code section 912(d); *People v Meredith* (1981) 29 C3d 682 (privilege extends to observations of evidence by investigator as long as object is not moved).) It does not extend to communications from an independent witness to counsel. (*Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 397.)

[Include the following paragraph if the discovery issue concerns an expert appointed under Evidence Code section 1017.]

Privileged information in statements and reports does not have to be disclosed when the witness is designated. (*Rodriguez v Superior Court* (1993) 14 CA4th 1260, 1270.)

Whenever an expert or other witness has been appointed by the court to assist the defense under Evidence Code section 1017, the report of that person is privileged under the express statutory provision for the psychotherapist-patient privilege. If the expert is appointed under Evidence Code section 952 or retained by the attorney, the report is protected by the attorney-client privilege. Moreover, if the order appointing the expert or witness was itself sealed under Evidence Code section 952, the identity of that witness would similarly be exempted from discovery as being privileged under the express, statutory, attorney-client privilege. (See 2 Witkin, Evidence, Witnesses §§140, 237 (5th ed).)

[Include the following paragraph if the expert examined the defendant to assist in evaluating whether an insanity plea should be entered.]

When an expert examines a defendant to assist the defendant's attorney in deciding whether an insanity plea should be entered or a mental defense tendered, the defendant's communications to the expert are protected. (*Rodriguez v Superior Court* (1993) 14 CA4th 1260, 1266.)

[Include the following paragraph if you are arguing that part of the material given to the expert is privileged and will not be relied on by the expert.]

Even if the defendant intends to call a particular witness, or even actually calls the witness to the stand, it does not follow that everything in that witness's case file is discoverable. (See *Sullivan v Superior Court* (1972) 29 CA3d 64; but see *Mize v Atchison, Topeka & Santa Fe Ry.* (1975) 46 CA3d 436 (waiver through failure to properly object); compare with *Julrik Prods., Inc. v Chester* (1974) 38 CA3d 807 (holder of privilege waived it by testifying about part of letter to attorney that was otherwise privileged).)

[Integrate the following section if there is a question concerning whether a "communication" is involved.]

The term "communications" includes information transmitted between the parties or advice given. *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 235 (encompasses almost any act performed by client as part of communication with attorney); *In re*

Navarro (1979) 93 CA3d 325 (includes attorney's display of public document to client); but see **People v Donovan (1962) 57 C2d 346** (state appraiser's opinion of condemned property's fair market value not within privilege when called by opposing party to testify as to his knowledge, and not as to disclosures he may have made to state's attorney); **People v Gillard (1997) 57 CA4th 136, 162** (photographs taken of defendant by defense counsel's investigator are attorney-client communication and privileged); **Suezaki v Superior Court (1962) 58 C2d 166, 176** (film of plaintiff prepared by defendant's investigator is not attorney-client communication). __ _ [Explain why the information transmitted in your case is a "communication"] __ _.

[Continue]

THE PROSECUTION MAY NOT MOVE TO COMPEL DISCOVERY UNTIL ALL DISCOVERY TO WHICH THE DEFENDANT IS ENTITLED HAS BEEN DISCLOSED

The party seeking to compel discovery must be in compliance itself:

Upon a showing that a party has not complied with Section 1054.1 and 1054.3 and upon a showing that the moving party *complied* with the informal discovery procedure provided in this subdivision, a court may make any order necessary....

Penal Code section 1054.5(b) (emphasis added).

See also **Izazaga v Superior Court (1991) 54 C3d 356** (defense obligation to disclose arises "[f]ollowing disclosure of the prosecution's witnesses.").

The defense cannot competently decide what evidence and witnesses are relevant to the case until it has full discovery.

Therefore, before this Court entertains the prosecution's motion, it should require the district attorney to aver that all discovery to which the defendant is entitled has in fact been disclosed.

CONCLUSION

For the above-stated reasons, defendant respectfully requests that the government's request for discovery and sanctions be denied.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____Attorney for _____[name of
defendant]_____

Comment: Any exhibits necessary to support opposition should be attached to the opposition, *e.g.*, a declaration by defense counsel that prosecution discovery was not received and the informal discovery request defense counsel served on the prosecution. The defense has the option of requesting in chambers review of materials. Pen C §1054.7; see *City of Alhambra v Superior Court* (1988) 205 CA3d 1118.

Arguments against a prosecution motion to compel discovery include failure to adhere to the requirements of Pen C §§1054–1054.7, *e.g.*:

- No informal request.
- What was requested informally is different from items listed in formal motion.
- Fifteen days have not passed since the informal request.
- Failure to follow the requirements of Cal Rules of Ct 4.111.
- The informal request did not describe what was desired with enough particularity to enable the defense to know what is wanted.
- The material requested is protected by the work product doctrine or by a privilege (Pen C §1054.6).
- The requested item is not required to be disclosed by Pen C §1054.3.
- The prosecution has not complied with the defense discovery request (Pen C §1054.5(b)).
- The defense does not yet know what witnesses or evidence it will use, if any, during its case-in-chief.

If the date set for discovery compliance is immediately before trial, there may not be time to seek a pretrial writ of prohibition if the trial court orders the defense to produce material it believes is not discoverable. The defense may have only the options of not disclosing—and risking exclusion of that witness's testimony at trial—or disclosing. If this problem is foreseeable in advance, defense counsel may be able to obtain an pretrial order protecting the undiscoverable material from disclosure. A motion for such an order should be set for hearing well in advance of trial. The argu-

ments suggested here to oppose the prosecution's motion to compel discovery can be used in support of a motion for a protective order. See 2 Witkin, *Evidence, Discovery* §249 (5th ed); *City of Alhambra v Superior Court* (1988) 205 CA3d 1118, 1135 n18; *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135; see also *Izazaga v Superior Court* (1991) 54 C3d 356; *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76.

Cross-Reference: For further discussion of discovery, see California Criminal Law Procedure and Practice, chap 11 (Cal CEB).

§11.6 F. Prosecution Motion to Compel Discovery

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that on __[date]__, at __[time]__, in Department __[number]__ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move that the Court compel discovery of the items previously requested informally of the defense on __[date]__, and not given to the prosecution. Those items are listed in the attached declaration and supporting memorandum. This motion will be based on the attached memorandum and informal discovery request, on the court records and pleadings in the court files for this case, on the attached declaration of __[name of declarant, usually the deputy district attorney assigned to the court or case]__, __[describe any other attached exhibits, e.g., a notice of receipt of partial discovery]__, and on any evidence and argument that may be presented at the hearing on this motion.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

The District Attorney, in __[his/her]__ informal discovery request, attached to this motion as Exhibit 1, asked the defense only for information permitted by Penal Code section 1054.3. The defense did not __[fully]__ comply. __[If the defense partially complied, describe what was and was not disclosed; that same information should be contained in a declaration of counsel that is attached as Exhibit 2 to the motion.]__

Based on Penal Code section 1054.3, the prosecution asks this court to order the defense to disclose the following information:

__[Set out the information you requested in your informal request that was not disclosed, and the subdivisions of Pen C §§1054–1054.7 that support those requests]__.

Date: _____

Respectfully submitted,

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
_____[Name]_____,
Defendant.

Dept. ____[number]____
No. ____[case number]____
**[PROPOSED] ORDER
GRANTING PEOPLE'S
MOTION FOR DISCOVERY
FROM DEFENDANT,**
_____[NAME]____

Having read and considered the People's motion for defense discovery, and having heard arguments from both the defense and the prosecution:

IT IS HEREBY ORDERED that the People's motion for defense discovery under Penal Code section 1054.3 is granted. Defendant and ____[his/her]____ counsel shall ____[immediately]____ provide to the People ____[30 calendar days before trial]____ or make available for inspection within that time frame:

1. The names and addresses of the witnesses, other than the defendant, whom the defendant intends to call as witnesses in the defense case-in-chief at trial.

2. All relevant written or recorded statements and/or reports of the witnesses described in paragraph 1, above.

3. All relevant reports and/or statements of experts made in connection with this case, including results of examinations, tests, experiments, or comparisons that the defense intends to offer as evidence at the trial of this matter.

4. All physical evidence that the defense intends to offer in evidence at trial.

IT IS FURTHER ORDERED that this order is a continuing one, through the trial of this matter.

Date: _____

_____[Signature of Judge]____

_____[Typed name]____

Judge of the Superior Court

Comment: An informal discovery request (see §11.13) is required before formal court enforcement of discovery can be requested. See Pen C §1054.5(b). This motion includes a proposed order. A copy of the informal request served on the defense, along with proof of service, if any, should be attached to the motion as exhibits. If there is no proof of service, a declaration by the person who served the informal notice on the defense, describing when, where, and on whom service was made should be attached as an exhibit.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

§11.7 G. Prosecution Motion for Sanctions

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that on __[date]__, at __[time]__, in Department __[number]__ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move the Court for sanctions against the defense under Penal Code section 1054.5 because the defense has failed to comply with the Court's __[date]__ discovery order. The People request that the following sanctions be imposed on the defense:

[Choose the relevant sanctions from the following.]

Defendant and defense counsel be held in contempt;

The testimony of defense witnesses be prohibited;

The presentation of real evidence be prohibited;

The jury be advised of the defense failure and refusal to disclose;

__[Any other order necessary to enforce the provisions of Penal Code sections 1054–1054.7]__.

Date: _____

Respectfully submitted,

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

This court ordered the defense to disclose the items listed in the order attached as Exhibit 1 on __[date]__. The defense has not disclosed __[specify]__. The prosecution therefore moves for sanctions.

The appropriate sanctions in this case are: __[Specify requested sanctions and why they are appropriate. Remember that the testimony of a witness may be prohibited only if all other sanctions have been exhausted. Pen C §1054.5(c)]__.

Date: _____

Respectfully submitted,

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

Comment: A motion for court-ordered discovery (see §11.6) may be combined with a motion for sanctions. The discovery order should be attached to the motion as an exhibit.

Although the preclusion of defense evidence is one remedy for defense failure to disclose (see *Taylor v Illinois* (1988) 484 US 400, 414, 108 S Ct 646; *Michigan v Lucas* (1991) 500 US 145, 111 S Ct 1743), the defense abuse must be shown to be egregious and calculated to obtain a tactical advantage, and other less restrictive sanctions must be shown to be ineffective. *People v Edwards* (1993) 17 CA4th 1248, 1264.

Cross-Reference: For further discussion of sanctions, see Crim Law §11.17.

§11.8 H. Motion for In Chambers Appointment of Defense Expert

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT:

Defendant, ___[name]___, asks the Court to appoint ___[specify type of expert, e.g., an investigator or psychotherapist]___ at court expense to aid the defense.

This is a confidential ex parte motion and will be based on the attached declaration and supporting memorandum, on the files in this case, and on any evidence produced at the confidential hearing in chambers on this motion.

Date: _____

Respectfully submitted,

___[Signature of attorney]___

___[Typed name]___

___[Title if in public defender office]___

Attorney for ___[name of defendant]___

[The supporting memorandum should start on a new page.

Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

The right to counsel includes the right to appointed experts when indigency is established (*People v Worthy* (1980) 109 CA3d 514) and the need for the expert is shown (*People v Worthy, supra*; *Mason v Arizona* (9th Cir 1974) 504 F2d 1345; *Puett v Superior Court* (1979) 96 CA3d 936). Such a showing may be made ex parte, in chambers, but on the record. (*Torres v Municipal Court* (1975) 50 CA3d 778.) Once indigency and need have been shown, appointment of the expert is mandatory. (*People v Worthy, supra*.)

In this case, ___[the Public Defender, or name of attorney, if private appointed counsel]___ has been appointed by the Court to represent

the defendant after a finding of indigency by the Court. The court may not grant a defendant the services of __[the Public Defender/ appointed counsel]__ and then deny him or her the services of necessary experts. To do so violates the right to counsel under the Sixth Amendment to the United States Constitution and the right to equal protection under the Fourteenth Amendment.

Counsel by the attached declaration has also met the second half of the burden, that of showing a reasonable need for the expert. If a further showing is required, counsel is prepared to make such a showing in chambers, ex parte, and on the record. (*Torres v Municipal Court, supra.*)

If appointed, the expert's services are confidential under Evidence Code section 952 (*City & County of San Francisco v Superior Court* (1951) 37 C2d 227; *Torres v Municipal Court, supra*). For the same reasons underlying the confidentiality of the expert's reports, and because disclosure of defense witnesses is controlled by Penal Code section 1054.3, the Court should also order that the expert's name be kept confidential until such time as a further order is made as permitted by law.

For the above-stated reasons, defendant respectfully requests that the Court grant the motion for appointment of an expert under Evidence Code sections 730 and 952.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.
See §1.9; Crim Law §18.5.]

**DECLARATION OF COUNSEL IN SUPPORT OF MOTION
FOR APPOINTMENT OF __[SPECIFY TYPE OF EXPERT]__**

I, __[name of declarant]__, declare:

I am the __[Deputy Public Defender/attorney]__ assigned to represent the defendant in this matter following appointment by the court.

I believe that, in order to adequately represent the defendant, I will require the services of __[specify type of expert, e.g., an investigator]__ to __[state what you want expert to do]__.

I am prepared to show defendant's need for an expert in more detail at an ex parte, in chambers, reported proceeding if the Court so requires.

The services of this expert must be on a confidential basis, because I or my client may need to transmit privileged information to and discuss tactics with the expert. See Penal Code section 1054.6, which preserves work product and information privileged under the United States Constitution from pretrial discovery.

I am informed and believe that experts are available for the purposes described above, and that their confidential services are available to those defendants who can pay for them.

I believe that the cost of performing the above-described work will not exceed __[dollar amount]__ for the services of __[name of expert]__, exclusive of witness fees.

I believe that the services of this expert are essential to a vigorous and competent preparation of the defense in this matter; without these services, I believe my client will not receive a constitutionally adequate defense.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

____[Signature of declarant]____

____[Typed name]____

____[Title of declarant if in public office]____

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
_____[Name]____,
Defendant.

Dept. ____[number]____
No. ____[case number]____
**[PROPOSED] ORDER FOR EX
PARTE APPOINTMENT OF**
____[SPECIFY TYPE OF
EXPERT]____

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that ____[name
of expert]____ be appointed under Evidence Code sections 730 and 952
to assist defense counsel in the preparation of the defense in this
matter.

The cost of this appointment is not to exceed ____[dollar amount]____,
excepting witness fees.

Date: _____

____[Signature of Judge]____

____[Typed name]____

Judge of the Superior Court

*[A proposed order should begin on a new page. See, e.g.,
Los Angeles Ct R 8.6(b) (proposed order must be separate
document). Even if filed as part of the motion, it should have a
separate caption. For further discussion, see Comment,
§18.5.]*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
_____[Name]____,
Defendant.

Dept. ____[number]____
No. ____[case number]____
**[PROPOSED] ORDER
PROHIBITING DISCLOSURE**

**TO THE COUNTY CONTROLLER OF _____ COUNTY, AND TO ALL
COURT PERSONNEL:**

IT IS HEREBY ORDERED that you shall keep confidential the con-
tents of the application made in this case pursuant to Evidence Code
sections 730 and 952, together with any accounting, order, and/or

exhibits filed in connection with such application until further order of this Court made after notice to defendant's counsel.

Date: _____ [Signature of Judge] _____
 _____ [Typed name] _____
Judge of the Superior Court

Comment: This motion includes both a proposed order for appointment of the expert and an order prohibiting disclosure of the motion, order, and any related paperwork. Because the motion seeks to keep both the expert's name and report confidential, all parts of it, including the order, should be sealed.

Cross-Reference: For further discussion, see Crim Law §§11.16, 18.10–18.15.

§11.9 I. Defense Motion to Preserve and Copy Tape (Harvey/Madden Motion)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order the __[name of police or sheriff's department]__ to retain in its possession and preserve as evidence in this matter all tape-recorded __[radio transmissions, phone calls, or both]__ by the __[name of police or sheriff's department]__ on __[date]__, between the hours of __[specify range of hours]__, concerning the above-named case. __[Specify other identifying information, e.g., names of the law enforcement officers.]__ **A copy of the law enforcement report** __[prepared by the officers involved in this transmission/concerning these phone calls]__ is attached as Exhibit A.

[Option 1: Request that tape be made available for copying.]

The Court is requested to order __[name of police or sheriff's department]__ to make that portion of the tape recording described above available to defendant's attorney or investigator for review and/or

copying for a period of 30 days until __[date]__, at which time the tape recording shall be released for regular use by the law enforcement department.

[Option 2: Request that law enforcement department copy tape.]

The Court is requested to order the __[name of police or sheriff's department]__ to make copies of the above-described portions of the tape and of the computer printout in this matter, and deliver them to __[name of attorney or public office]__ by __[date]__.

[Continue]

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, the attached law enforcement report (Exhibit A), and on any evidence and argument that may be presented at the hearing on this motion.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[This memorandum concerns tape recordings of radio transmissions.]

The defense is entitled to obtain copies of tape recordings concerning communications by law enforcement officers involved in a defendant's arrest. *People v Madden* (1970) 2 C3d 1017; *Ojeda v Superior Court* (1970) 12 CA3d 909; *People v Harvey* (1958) 156 CA2d 516.

The defendant asks this Court for an order to preserve and copy the tape involving communications among the law enforcement officers involved in the defendant's arrest. Identifying information is con-

tained in the motion, above, in the attached law enforcement report (Exhibit A), and in the attached order.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff

vs

_____[Name]____,

Defendant.

Dept. ____[number]____

No. ____[case number]____

**[PROPOSED] ORDER FOR
PRESERVATION AND
COPYING OF TAPE**

**TO: ____[CHIEF OF POLICE OF THE CITY OF _____]/THE SHERIFF OF
_____ COUNTY]____, CALIFORNIA:**

IT IS HEREBY ORDERED that the ____[name of police or sheriff's
department]____ shall retain in its possession and preserve as evi-
dence in this matter all tape-recorded ____[radio transmissions and/or
phone calls]____ by the ____[name of police or sheriff's department]____ on
____[date]____, between the hours of ____[give range of hours]____, concern-
ing the above-named case.

[Option 1: Request that tape be made available for copying.]

**You are also ordered to make that portion of the tape recording
described below available to defendant's attorney or investigators for
review and/or copying for a period of 30 days until ____[date]____, at
which time the tape recording shall be released for regular use by the
law enforcement department.**

[Option 2: Request that law enforcement department copy
tape.]

You are also ordered to make a copy of the portions of the tape described below, and deliver them to __[name of attorney or public office]__ **by** __[date]__.

IT IS FURTHER ORDERED that the above items may not be destroyed until full compliance with this court order has occurred.

The following identifying information relates to this case:

Law Enforcement Report No. and Date: __[Specify]__.

Approximate Location of Incident: __[Specify]__.

Crime Charged: __[Specify]__.

Date: _____

__[Signature of Judge]__

__[Typed name]__

Judge of the Superior Court

Comment: This motion includes a proposed order. The motion may be modified to request preservation and copying of a videotape. Tapes belonging to state agencies must be preserved for at least 2 years. 64 Ops Cal Atty Gen 435 (1981). City and county agencies must preserve “recordings of telephone and radio communications maintained by the department or special district” for at least 100 days and must maintain all routine videotapes for 1 year. If the recordings are evidence in any pending claim or litigation, they must be preserved through resolution of that litigation or claim. Govt C §26202.6(a). See *Nelson v Superior Court* (2001) 89 CA4th 565, 572. Because not all agencies observe these rules, it is important to request a copy of such a tape as soon as its existence is revealed.

Usually, direct notification to the agency that has the tape is the first step. The notice should be made in a manner that provides proof that the agency was notified, *e.g.*, certified mail, return receipt requested, or personal service. Some agencies will comply without a court order. A request for a copy of the tape should also be included in the informal discovery request submitted to the prosecution.

A subpoena duces tecum form should be attached to the motion (see §3.1) along with a copy of the crime report. The affidavit or declaration accompanying the subpoena should include any other information that

will help law enforcement personnel locate the portion of the tape that is desired, such as the date and time of the radio transmission or phone call and the names of the officers who received and/or sent the transmission or taped the phone call. If the judge signs the order and issues the subpoena duces tecum, the original of each is served on the relevant law enforcement agency, and a copy with the signature of the person who received service is filed with the court that issued the order.

Possible prosecution arguments opposing the motion include the following:

- The defense did not include enough information to enable law enforcement to find the tape.
- The request is being made past the applicable deadline for preserving the tape.
- No supporting memorandum was included (see Cal Rules of Ct 4.111).
- No evidence exists that any such tape exists.

See *Fowler v Superior Court* (1984) 162 CA3d 215.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

§11.10 J. Defense Motion for Transfer of Evidence for Retesting

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court compel the prosecution to transfer __[describe type of sample, e.g., blood, DNA]__ specimen from __[name and address of laboratory where specimen is currently kept]__ to __[name and address of laboratory where defense wants evidence retested]__ to permit defendant to obtain an independent analysis of said specimen for the presence of __[state why being tested, e.g., heroin]__. The particular specimen that

is the subject of said motion is the __[state type, e.g., blood, DNA]__ taken from defendant __[name]__ on __[date]__, submitted to the __[name of laboratory that now has sample]__ by __[name of city]__ Police Department as recorded in their Report No. __[number]__, and listed at the __[name of lab that now has sample]__ as No. __[number]__.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

THE DEFENSE HAS THE RIGHT TO RETEST A __[TYPE OF SAMPLE, E.G., BLOOD, DNA]__ SAMPLE IF IT HAS BEEN PRESERVED

A defendant can have a __[type of sample, e.g., blood, DNA]__ sample retested by an independent laboratory if the sample was preserved. Title 17 of the California Code of Regulations sections 1219.1(f)(2), 1219.2(c)(1); Penal Code §299.5(g); *People v Washington* (1958) 163 CA2d 833 (marijuana); *Prince v Superior Court* (1992) 8 CA4th 1176, 1180 (defendant should have independent, confidential access to crime scene DNA).

THE DEFENSE HAS THE RIGHT TO EXCULPATORY EVIDENCE; THE REQUESTED RETEST MAY PRODUCE EXCULPATORY EVIDENCE

The defense has the right to exculpatory evidence. Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194. If the retest of the sample of __[e.g., defendant's blood, DNA]__ shows that __[state favorable outcome you anticipate from the retest]__, this will be exculpatory evidence because __[explain why]__. See *Schin-*

der v Superior Court (1958) 161 CA2d 513, 520, disapproved on other grounds in People v Garner (1961) 57 C2d 135, 142; People v Nation (1980) 26 C3d 169, 176. The defense therefore has the right to retest the sample of __ [e.g., defendant's blood, DNA] __ taken on __ [date] __.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff

vs

__ [Name] __,

Defendant.

Dept. __ [number] __

No. __ [case number] __

**[PROPOSED] ORDER FOR
TRANSFER OF EVIDENCE
AND PROTECTIVE ORDER**

TO: __ [NAME OF LABORATORY WHERE PROSECUTION IS KEEPING SPECIMEN] __:

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that __ [name of laboratory where prosecution is keeping specimen] __ **physically deliver a portion of the specimen described below to** __ [name, address, and phone number of laboratory to which specimen is to be transferred/name of your investigator or expert if the specimen is to be given to him or her] __.

SPECIMEN: __ [Describe specimen, where it came from, who it was given to, and give any numbers it might have, e.g., blood sample taken from defendant, on November 30, 2004, and submitted to the Institute of

Forensic Sciences by the Center City Police Department, relative to Center City Police Report No. 1234, and listed at the Institute of Forensic Sciences as No. ABCD]__.

Once the __[*name of laboratory where specimen is being sent for retest*]__ has completed its duties with regard to said specimen, it shall immediately return the remaining specimen to __[*name of laboratory where prosecution had specimen tested*]__.

Once the specimen is returned to the __[*name of prosecution laboratory*]__, that laboratory will accept the remaining specimen and preserve it until there has been a final and complete disposition of the above-entitled action.

[Option: Include if results will be released only to defense counsel.]

IT IS FURTHER ORDERED that __[*name of defense laboratory*]__ will only release information regarding the samples in the above-entitled case, or any results from any testing done on those samples, to defense counsel. This means that no information concerning these samples is to be given to the District Attorney, the Sheriff's Department, or __[*name every relevant law enforcement agency*]__.

[Option: Include if results are to be examined by a neutral expert.]

IT IS FURTHER ORDERED that __[*name of independent laboratory*]__ will test the samples in the above-entitled case and results of that test shall be made available to both defense counsel and the prosecution.

[Continue]

Date: _____

__[*Signature of Judge*]__

__[*Typed name*]__

Judge of the Superior Court

Comment: This motion includes a proposed order. The prosecution will usually stipulate to the transfer of a portion of the specimen for retesting because transfer of a specimen by one laboratory to another presents a de minimis possibility of evidence tampering. However, a stipulation may not be forthcoming if retesting will consume the rest of the specimen. The court has the discretion to craft an appropriate discovery order. For

example, the court may allow an independent expert to test the sample or instruct the defense expert to share results with the prosecution. *People v Varghese* (2008) 162 CA4th 1084.

Most jurisdictions have set procedures and preprinted forms for stipulating to a retest. If not, the above order can be reworded and labeled as a stipulation. Most prosecutors, however, will not stipulate to the results of the retest only being given to the defense (see optional paragraph in proposed order above) and will insist on receiving a copy of the defense retest report. See Pen C §§1054.3–1054.4. The prosecution may also want to have its expert present during the retest.

Cross-Reference: For further discussion of retesting, see Crim Law §§11.27, 55.21.

§11.11 K. Defense Motion to Dismiss Because of Destruction or Loss of Evidence (Trombetta/Youngblood Motion)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on [date] , in Department [number] at [time] , or as soon thereafter as the matter may be heard, the defendant, [name] , will move that the Court dismiss the above-entitled case because of the destruction and/or loss of [specify evidence] by [specify law enforcement agency] . That evidence was vital to the defense because [briefly state why] . This motion will be based on the attached supporting memorandum, [the attached declaration(s), the attached exhibit(s)] , all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender office]____

Attorney for [name of defendant]

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

STATEMENT OF FACTS

__ *[Describe relevant facts of case. Include a description of the destroyed or lost items, how they were lost or destroyed and by whom, and facts concerning the case that demonstrate the importance of those items. Cite authority for these statements, e.g., a police report, and attach a copy as an exhibit.]* __

ARGUMENT

[The following arguments are illustrative of those that may be made; select those relevant to your case, and add any others that apply.]

THE PROSECUTION HAD A DUTY IN THIS CASE TO PRESERVE

__ *[BRIEFLY DESCRIBE THE DESTROYED OR LOST ITEMS]* __

The law does not impose a duty on the prosecution to collect evidence that might be beneficial to the defense; however, once collected, the prosecution does have a duty to preserve material evidence. (*In re Michael L.* (1985) 39 C3d 81; *People v Hogan* (1982) 31 C3d 815, 851, overruled on other grounds in *People v Cooper* (1991) 53 C3d 771, 836.)

In this case, the __ *[name of city]* __ Police Department __ *[tell how they obtained the lost or destroyed evidence, then how it was lost or destroyed]* __.

THE __ *[DESTROYED/LOST]* __ EVIDENCE WAS MATERIAL TO THE DEFENSE CASE

If the prosecution preserved and then destroyed or permanently lost evidence, the defense may make a motion for sanctions, called a *Trombetta* or *Youngblood* motion. The destroyed evidence must have been material to the defense case. (*Arizona v Youngblood* (1988) 488 US 51, 109 S Ct 333 (evidence that might have exonerated defendant

destroyed in bad faith); *California v Trombetta* (1984) 467 US 479, 488, 104 S Ct 2528 (no bad faith shown, but evidence material and exculpatory.)

The materiality of evidence in California is determined under the *Trombetta/Youngblood* federal standard. (*People v Zapien* (1993) 4 C4th 929, 964; *People v Cooper* (1991) 53 C3d 771, 810; *People v Johnson* (1989) 47 C3d 1194, 1233, overruled on other grounds in *People v Gutierrez* (2017) 2 C5th 1150.) Material evidence is evidence that might be expected to play a significant role in the suspect's defense. It must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*California v Trombetta, supra*.)

The evidence that was __[destroyed/lost]__ by the prosecution in this case was __[specify lost/destroyed evidence here, e.g., a bloody jacket, police officer notes]__. This evidence was material to the defendant's case because __[describe why evidence was material/favorable/exculpatory within the above guidelines]__. The __[favorable/exculpatory]__ value of the evidence was apparent before the evidence was __[destroyed/lost]__. __[Add further explanation if desired.]__ No comparable evidence can be obtained by the defense by any other reasonably available means. __[Add further explanation if desired.]__

The above-described actions of __[the prosecution/law enforcement]__ have summarily denied __[insert accused's name]__ the right to present favorable and material evidence that would play a significant role in __[his/her]__ defense.

THE PROSECUTION ACTED IN BAD FAITH IN __[DESTROYING/LOSING]__ THE EVIDENCE IN THIS CASE

To support sanctions for loss or destruction of evidence under *Trombetta* and *Youngblood*, the prosecution must have acted in bad faith in destroying the evidence. (*Arizona v Youngblood* (1988) 488 US 51, 58, 109 S Ct 333.)

__[Describe why law enforcement acted in bad faith in destroying or losing the evidence.]__

THE APPROPRIATE SANCTION IN THIS CASE IS DISMISSAL

This Court should dismiss the instant action because __ [explain why] __. In the alternative, this Court should order sanctions that would ensure a fair trial for __ [name of defendant] __. __ [Suggested alternative sanctions, such as cautionary or directory instructions (*Arizona v Youngblood* (1988) 488 US 51, 54, 109 S Ct 333), or exclusion of the evidence (see *California v Trombetta* (1984) 467 US 479, 486, 104 S Ct 2528)] __.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

Comment: Any documents, such as police reports and declarations, that support the claim that particular evidence was seized by law enforcement, was destroyed, was material, and was lost or destroyed because of law enforcement bad faith should be attached as exhibits. When relevant, the supporting memorandum should also explain why other evidence cannot take the place of the missing evidence.

When possible, a motion for sanctions based on the destruction of evidence should be made in the trial court before the evidence at issue is introduced and after jeopardy has attached. *People v Taylor* (1977) 67 CA3d 403. The motion may be made before trial at the court's discretion; however, any such ruling is not binding on the trial judge. See *People v Rawlings* (1974) 42 CA3d 952, 959, disapproved on other grounds in *People v Chacon* (2007) 40 C4th 558, 565 n7; *People v Leighter* (1971) 15 CA3d 389, 394, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77. See also *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257. The hearing on the motion is the same as any hearing on the admissibility of evidence.

The prosecution may oppose a pretrial determination concerning missing or destroyed evidence on grounds including the following:

- No final determination can be made before trial.
- The evidence is not material. *In re Michael L.* (1985) 39 C3d 81.
- The evidence was not "exculpatory" as required by *Trombetta* and/or was never collected. *California v Trombetta* (1984) 467 US 479, 488, 104 S Ct 2528; *People v Coles* (2005) 134 CA4th 1049, 1054.

- The defense has not shown that evidence comparable to the lost or destroyed evidence could not be obtained by other reasonably available means. *California v Trombetta* (1984) 467 US 479, 489, 104 S Ct 2528; *People v Angeles* (1985) 172 CA3d 1203, 1214.

- The defense has not shown that the exculpatory value of the evidence was apparent before it was destroyed. *California v Trombetta* (1984) 467 US 479, 489, 104 S Ct 2528; *People v Angeles* (1985) 172 CA3d 1203, 1214.
- The prosecution did not act in bad faith. *Arizona v Youngblood* (1988) 488 US 51, 58, 109 S Ct 333.

If the court finds that the prosecution did act in bad faith, a lesser sanction than dismissal may be imposed, *e.g.*, a cautionary jury instruction. 488 US at 54.

Cross-Reference: For discussion of *Trombetta/Youngblood* motions, see Crim Law §§11.27–11.28.

§11.12 L. Defense Motion for Discovery of Police or Custodial Officer Conduct (*Pitchess* Motion)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, THE __[CITY ATTORNEY OF __[NAME OF CITY]__/__[NAME OF COUNTY]__ COUNTY COUNSEL]__, **STATE OF CALIFORNIA, AND THE** __[CHIEF OF POLICE OF __[NAME OF DEPARTMENT]__/SHERIFF OF __[NAME OF COUNTY]__ COUNTY]__:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__, at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order the City Attorney's Office and the above-noticed law enforcement agency (at all times hereafter referred to as "The Department") to make available for examination, copying, and for the hearing on this motion the materials described below regarding the following __[name of police department]__ officers: __[Give names of officers, and their badge numbers if known.]__

__[List materials desired. See the items listed in the Order at the end of this motion for examples. Begin a new paragraph with each one, and number them for easy reference during the hearing on this motion.]__

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__**Attorney for** __[name of
defendant]__

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

The discovery desired of the __[name of police or sheriff's department]__, **hereafter "The Department," concerning officers** __[state names, and badge numbers if known]__ **is listed below, with supporting authorities. All requests are based on federal due process (see *Brady v Maryland* (1963) 373 US 83, 87, 83 S Ct 1194), California due process, and California Constitution article I, section 28(f), in addition to the authorities cited below. All the information below is requested regardless of the disposition of the matters.**

1. The names, addresses, and telephone numbers of all persons who have filed complaints with The Department for acts indicating or constituting racial or ethnic prejudice, dishonesty, false arrest, illegal search and seizure, planting evidence, or the fabrication of charges and/or evidence by the above-named officer(s). (Evidence Code section 1045(a); *Pierre C. v Superior Court* (1984) 159 CA3d 1120; *Pitchess v Superior Court* (1974) 11 C3d 531; *Cadena v Superior Court* (1978) 79 CA3d 212; *Arcelona v Municipal Court* (1980) 113 CA3d 523; *Gonzales v Municipal Court* (1977) 67 CA3d 111.)

2. The names addresses, and telephone numbers of all persons who have filed complaints with The Department against the above-named officers for any act involving morally lax character. (California Constitution article I, section 28(f); *People v Wheeler* (1992) 4 C4th 284; *People v Mickle* (1991) 54 C3d 140, 168; *People v Harris* (1989) 47 C3d 1047, 1080–1082; *In re Ferguson* (1971) 5 C3d 525, 533; *People v Taylor* (1986) 180 CA3d 622.)

3. The names, addresses, and telephone numbers of all persons who have filed complaints with The Department against the above-named officers for unnecessary acts of aggressive behavior, acts of violence and/or attempted violence, or acts of excessive force and/or attempted excessive force. (California Constitution article I, section 28(f); Evidence Code section 1045(a); *People v Wheeler*, *supra*; *People v Mickle*, *supra*; *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74; *People v Harris*, *supra*; *Pitchess v Superior Court*, *supra*; *In re Ferguson*, *supra*; *Cadena v Superior Court*, *supra*; *Arcelona v Municipal Court*, *supra*; *Gonzales v Municipal Court*, *supra*; *People v Taylor*, *supra*.)

4. All statements, written or oral, by persons who have brought complaints against the above-named officers as described in Items 1, 2, and 3, above. (California Constitution article I, section 28(f); *Caldwell v Municipal Court* (1976) 58 CA3d 377; *Hinojosa v Superior Court* (1976) 55 CA3d 692; *Gonzales v Municipal Court*, *supra*; *People v Wheeler*, *supra*; *People v Mickle*, *supra*; *People v Harris*, *supra*; *In re Ferguson*, *supra*; *People v Taylor*, *supra*.)

5. The names, addresses, and telephone numbers of all persons interviewed by The Department, its investigators and other personnel during investigation into complaints as described in Items 1, 2, and 3, above, against the above-named officer(s). (California Constitution article I, section 28(f); Evidence Code section 1045(a); *Pitchess v Superior Court*, *supra*; *Arcelona v Municipal Court*, *supra*; *Kelvin L. v Superior Court* (1976) 62 CA3d 823; *Lemelle v Superior Court* (1978) 77 CA3d 148; *Gonzales v Municipal Court*, *supra*; *People v Wheeler*, *supra*; *People v Mickle*, *supra*; *People v Harris*, *supra*; *In re Ferguson*, *supra*; *People v Taylor*, *supra*.)

6. All statements, written or oral, made by persons interviewed by the Department, its investigators and other personnel during their investigation into complaints as described in Item 5, above. (California Constitution article I, section 28(f); Evidence Code section 1045(a); *Caldwell v Municipal Court*, *supra*; *Hinojosa v Superior Court*, *supra*; *People v Matos* (1979) 92 CA3d 862; *Gonzales v Municipal Court*, *supra*; *People v Wheeler*, *supra*; *People v Mickle*, *supra*; *People v Harris*, *supra*; *In re Ferguson*, *supra*; *People v Taylor*, *supra*.)

7. All tape recordings and/or transcriptions thereof, and notes and memoranda by investigating personnel of The Department made in investigations described in Items 1, 2, 3 and 5, above. (California Con-

stitution article I, section 28(f); *Caldwell v Municipal Court, supra*; *Hinojosa v Superior Court, supra*; *People v Matos* (1979) 92 CA3d 862; *Arcelona v Municipal Court* (1980) 113 CA3d 523, 530; *People v Wheeler, supra*; *People v Mickle, supra*; *People v Harris, supra*; *In re Ferguson, supra*; *People v Taylor, supra*.)

8. The names and assignments of investigators and other personnel employed by The Department as described in Items 1, 2, 3, and 5. (*Caldwell v Municipal Court, supra*; *People v Wheeler, supra*; *People v Mickle, supra*; *People v Harris, supra*; *In re Ferguson, supra*; *People v Taylor, supra*.)

9. The written procedures established by The Department to investigate citizen complaints against The Department or its personnel. (Penal Code section 832.5(a).)

10. All records of The Department concerning records of statements and opinions, including, but not limited to, findings, letters, formal reports, and oral conversations made by superior officers and fellow officers, of the above-named police officer(s), that pertain to acts indicating or constituting racial or ethnic prejudice, dishonesty, false arrest, illegal search and seizure, the fabrication of charges and/or evidence, planting evidence, or any act demonstrating a morally lax character. (California Constitution article I, section 28(f); *Pierre C. v Superior Court, supra*; *Cadena v Superior Court, supra*; *Hinojosa v Superior Court, supra*; *Arcelona v Municipal Court, supra*; *People v Wheeler, supra*; *People v Mickle, supra*; *People v Harris, supra*; *In re Ferguson, supra*; *People v Taylor, supra*.)

11. All records of The Department concerning records of statements and opinions, including, but not limited to, findings, letters, formal reports, and oral conversations made by superior officers and fellow officers, of the above-named police officer(s), that pertain to unnecessary acts of aggressive behavior, acts of violence and/or attempted violence, acts of excessive force and/or attempted excessive force, and acts demonstrating racial or ethnic prejudice, or any act demonstrating a morally lax character. (California Constitution article I, section 28(f); *Cadena v Superior Court, supra*; *Hinojosa v Superior Court, supra*; *Arcelona v Municipal Court, supra*; *People v Wheeler, supra*; *People v Mickle, supra*; *People v Harris, supra*; *In re Ferguson, supra*; *People v Taylor, supra*.)

12. All records of discipline imposed by The Department upon the above-named police officer(s) for conduct specified in Items 1, 2, 3, 10, and 11. (California Constitution article I, section 28(f); Evidence Code section 1045(a); *Arcelona v Municipal Court, supra*; *Cadena v Superior Court, supra*; *People v Wheeler, supra*; *People v Mickle, supra*; *People v Harris, supra*; *In re Ferguson, supra*; *People v Taylor, supra*.)

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

DECLARATION IN SUPPORT OF MOTION FOR PRETRIAL DISCOVERY

I, ____[name of declarant, usually defense counsel]____, declare:

1. That I am ____[state title if in public office, e.g., an Assistant Public Defender for the County of _____, and]____ the attorney of record for the above-named defendant.

2. That I am informed and believe that ____[name of police or sheriff's department]____, hereafter "The Department," makes and keeps written records of complaints received by The Department and that such records are kept in files maintained by The Department.

3. That I am informed and believe that from time to time persons give statements to The Department concerning officers of The Department, alleging that said officers ____[tell what the allegations are expected to be, e.g., committed acts indicating racial or ethnic prejudice, or dishonesty; acts constituting false arrest, illegal search and/or seizure, or the fabrication of charges and/or evidence; acts of aggressive behav-

ior, and/or violence, and/or attempted violence, and/or excessive force, and/or attempted excessive force; acts involving a "morally lax" character]__.

4. That I am informed and believe that The Department assigns personnel to investigate said complaints. That these personnel correspond with or interview complainants, witnesses, and other persons and make notes, memoranda, and records of conversations in connection with their investigations and prepare and file reports, findings, opinions, and conclusions concerning their investigations. That The Department keeps in its personnel record files, or other files, notes, findings, memoranda, recordings, reports, transcripts, opinions, and conclusions of the investigations made and of the disciplinary proceedings commenced as the result of such complaints. That said files contain the names, addresses, and telephone numbers of witnesses interviewed during such investigations and of persons) who initiate complaints (as are described in the preceding paragraph).

5. That I am informed and believe that the records, data, and materials described in paragraphs (1) through __[give ending number]__ of the Notice of Motion, Supporting Memorandum, and Order for Pre-trial Discovery filed and served herein are in the exclusive possession and control of The Department and/or the Office of _____ County District Attorney, and are readily available to each of them; that said records, data, and materials are not known to either defendant or defense counsel and will not otherwise be made available to defendant or defense counsel.

6. A substantial issue in the trial of this case may be __[describe generally the potential defense or defenses to the pending charges relating to officer misconduct, e.g., the fabrication of charges and/or evidence by police, false arrest, illegal search and seizure, police officer perjury, excessive and illegal use of force or violence, the attempted use of excessive and illegal use of force or violence]__ on the part of the officers involved.

7. Specifically, in this case, based on my information and belief, the factual foundation to support the defense argument of officer misconduct as detailed above is as follows: __[describe plausible factual scenario of specific police misconduct supporting the general defense(s)]

put forth in item 6; or, if applicable and consistent with the defense(s) above, issue denial of the facts asserted by the officer(s) in the police report]__.

[Use those items below that are relevant to your case and add any others that fit the case.]

8. The above-listed materials are necessary for the proper preparation of this case for trial. The materials may be used as follows:

(A) To locate and investigate witnesses or other evidence of the dishonest character of the officer(s) involved to show that the officer(s) acted in conformity with that character at the time of this incident;

(B) To locate and investigate witnesses or other evidence of aggressive character of the officer(s) involved to show that the officer(s) acted in conformity with that character at the time of this incident;

(C) To refresh the recollection of witnesses to incidents of fabrication of charges and/or evidence by the officer(s) involved and/or to incidents of the use of illegal or excessive force by the officer(s) so that defense counsel may accurately ascertain the facts and circumstances of those incidents;

(D) To properly prepare for cross-examination and impeachment of witnesses to be called by the prosecution;

(E) To properly assess the credibility of the defendant and defense witnesses; and

(F) To impeach the testimony of the officers involved with acts showing a morally lax character and hence a readiness to lie.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

____[Signature of declarant]____

____[Typed name]____

____[Title of declarant if in public office]____

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff

vs

__[Name]__,

Defendant.

Dept. __[number]__

No. __[case number]__

[PROPOSED] ORDER

TO __[NAME OF CITY ATTORNEY OR COUNTY COUNSEL, AND
TITLE]__ **AND TO** __[NAME OF POLICE CHIEF OR SHERIFF, AND
TITLE]__:

It appearing to this Court from the attached declaration, from testimony and argument at the hearing on this motion, and from information presented at an in chambers hearing held on this motion, that there are in your possession or under your control certain items that have a bearing on this action, and, GOOD CAUSE APPEARING THEREFOR:

IT IS HEREBY ORDERED that you and each of you make available to the attorney of record or __[his/her]__ investigator in the above-entitled action for inspection and copying all the following information in your possession pertaining to __[give names of officers, and their badge numbers if known]__:

1. The names, addresses, and telephone numbers of all persons who have filed complaints with the __[name of law enforcement agency]__, **hereafter “The Department,” for acts indicating or constituting** __[e.g., racial or ethnic prejudice, dishonesty, false arrest, illegal search and seizure, the fabrication of charges and/or evidence, any act involving morally lax character, unnecessary acts of aggressive behavior, acts of violence and/or attempted violence, acts of excessive force and/or attempted excessive force,]__ **by the above-named officer(s).**

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

2. All statements, written or oral, by persons who have brought complaints as described in Item 1, above.

ORDERED BY THE COURT: Granted _____ Denied _____

Modified: _____

3. The names, addresses, and telephone numbers of all persons interviewed by The Department, its investigators and other personnel during investigation into complaints as described in Items 1 and 2, above, by the above-named officer(s).

ORDERED BY THE COURT: Granted _____ Denied _____

Modified: _____

4. All statements, written or oral, made by persons interviewed by the Department, its investigators and other personnel during investigation into complaints as described in Item 3, above.

ORDERED BY THE COURT: Granted _____ Denied _____

Modified: _____

5. All tape recordings and/or transcriptions thereof, and notes and memoranda by investigating personnel of The Department made pursuant to investigations described in Items 1 and 3, above.

ORDERED BY THE COURT: Granted _____ Denied _____

Modified: _____

6. The names and assignments of investigators and other personnel employed by The Department as described in Items 1 and 3, above.

ORDERED BY THE COURT: Granted _____ Denied _____

Modified: _____

7. The written procedures established by The Department to investigate citizen complaints against The Department or its personnel.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

8. All records of The Department concerning records of statements, reputations and opinions, including, but not limited to, findings, letters, formal reports, and oral conversations made by superior officers and other officers, of the above-named police officer(s), which pertain to acts indicating or constituting __[Specify area of interest, e.g., racial prejudice or acts of unnecessary violence.]__

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

9. All records of discipline imposed by The Department on the above-named police officer(s) for conduct specified in Items 1 and 8, above.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

10. In accordance with Evid C §1045(e) and *Alford v Superior Court* (2003) 29 C4th 1033, 1042, the information and/or records ordered to be disclosed herein shall not be used for any purpose other than in the underlying court proceeding.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

Date: _____

__[Signature of Judge]__

__[Typed name]__

Judge of the Superior Court

Comment: This motion must be served on the government agency (*i.e.*, the police or sheriff's department) that has custody of the records. Evid C §1043(a). The motion must be served at least 16 court days before the date set for the hearing on the motion. This 16-day period applies when the

motion is personally served. If the motion is faxed or served by express mail or another overnight delivery service, the 16-day notice period must be increased by 2 calendar days. If the motion is served by regular mail, the 16-day notice period must be increased by 5 calendar days if it is mailed from an address in California to an address in California, by 10 calendar days if either the mailing address or the delivery address is outside California, and by at least 20 calendar days if either the mailing address or the delivery address is outside the United States. Evid C §1043(a); CCP §1005(b).

The motion must include (Evid C §1043(b)):

- The name of the defendant and the criminal case for which the discovery is sought;
- The name of the police or custodial officer whose records are sought;
- A description of the records sought;
- Affidavits (or declarations, which may be substituted for affidavits under CCP §2015.5) that show good cause for the discovery or disclosure sought, describe the materiality of the subject matter, and set forth an allegation of a reasonable belief that the government agency identified in the request has the requested records; and
- The time and place the discovery motion will be heard.

A copy of the law enforcement report that sets forth the circumstances of the defendant's stop and arrest should be attached if excessive force is alleged. See Evid C §1046. In many cases, the court may wish to review the police report underlying the case "in conjunction" with the averments in defendant's motion. *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 89. See also *City of San Jose v Superior Court* (1998) 67 CA4th 1135, 1147. A subpoena duces tecum addressed to the Chief of Police or Sheriff, and listing the items that are in the order, should also be attached. Witness statements corroborating the alleged officer misconduct may be attached to strengthen the *Pitchess* motion, but they are not required. *Warwick v Superior Court* (2005) 35 C4th 1011, 1025.

The supporting declaration or affidavit required by Evid C §1043(b)(3) must make a plausible showing of justification for discovery and be sufficiently specific to allow the information to be identified. See Evid C §1043(b)(3); *City of San Jose*, 67 CA4th at 1147; *People v Memro* (1985) 38 C3d 658, 678 n19, overruled on other grounds in *People v Gaines* (2009) 46 C4th 172, 181 n2. The declaration can be made by the defendant or defense counsel (see 38 C3d at 682) on information and belief as long

as the statutory requirements of the motion are otherwise met. *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 89; *City of San Jose*, 67 CA4th at 1147.

To show good cause for discovery, the required declaration or affidavit must articulate certain facts. It must “propose a defense or defenses to the pending charges.” *Warrick v Superior Court* (2005) 35 C4th 1011, 1024. See also *City of San Jose*, 67 CA4th at 1147. It must contain supporting facts that “describe a factual scenario that supports the claimed officer misconduct” that “might or could have occurred.” *Warrick*, 35 C4th at 1024; *City of San Jose*, 67 CA4th at 1147. The description need not guess the motives of the police officers, and depending on the facts of the case, a general denial of the statements of police in the police report may suffice. *Warrick*, 35 C4th at 1024; see *People v Hustead* (1999) 74 CA4th 410, 416. The declaration or affidavit must also demonstrate how the requested information may lead to relevant evidence or may itself be admissible as direct or impeachment evidence. *Warrick*, 35 C4th at 1024; *Hustead*, 74 CA4th at 417.

The affidavit may be filed under seal to protect against revelation of privileged information. The defense must show that the information in the affidavit is in fact privileged because it comes from the client or is core work product. If the court determines that the information is privileged, it must order that the affidavit be sealed. If the court rules that the information is not privileged, the court must allow defense counsel to amend to include (or exclude) privileged information, rewrite the affidavit as a denial, or agree that the affidavit will not be sealed. However, this procedure will not be required to be followed very often, because of the minimal showing necessary to compel the in camera review of the officer’s personnel file. *Garcia v Superior Court* (2007) 42 C4th 63, 71.

If the trial court finds the defense has established good cause for discovery, it must then review the personnel records in chambers and order disclosure if they are relevant. See, e.g., *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74. See also Evid C §§1043, 1045(b). It is customary for trial courts to order disclosure of only the names, addresses, and phone numbers of witnesses and dates of any prior complaints. 49 C3d at 84. In some cases, a supplemental motion may be warranted to obtain disclosure of additional information or the full verbatim police reports. *Alvarez v Superior Court* (2004) 117 CA4th 1107, 1112.

This motion includes a proposed order. If the judge signs the order, it should be served on the chief of police or sheriff along with a subpoena duces tecum. See *People v Superior Court (Broderick)* (1991) 231 CA3d

584. The court must order that the records disclosed may not be used for any purpose other than the underlying court proceeding. Evid C §1045(e); *Alford v Superior Court* (2003) 29 C4th 1033, 1042. The materials may be released, on request, to the officers who are the subject of the materials. *Becerrada v Superior Court* (2005) 131 CA4th 409.

NOTE► *Pitchess* motions may be brought in administrative hearings under Evid C §§1043 and 1045, and an administrative hearing officer may conduct the in-camera hearing in addition to ruling on the motion. See *Riverside County Sheriff's Dep't v Stiglitz* (2014) 60 C4th 624, 641.

Cross-Reference: For further discussion of *Pitchess* motions, see Crim Law §§11.19–11.24.

§11.13 M. Defense Motion for Discovery of Victim's Violent Conduct

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO: THE DISTRICT ATTORNEY OF _____ COUNTY AND THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on __[date]__ at __[time]__ or as soon thereafter as the matter can be heard __[in Department ____ of the above-entitled court]__, the defendant, __[name]__, will ask the court for an order directing the People of the State of California to make available for inspection and copying (1) the record of any criminal convictions of the victim that may be used for impeachment and (2) all records of violence of the alleged victim including charges, convictions, and police reports.

This motion is made on the grounds that the information requested is in the actual or constructive possession of the District Attorney or readily available to __[him/her]__ and is reasonably required by the defendant for the preparation of the defense for trial, and that the defendant cannot readily obtain the information through __[his/her]__ own efforts. The motion is based on the attached declaration, supporting memorandum, the records of the case, and such other evidence as may be presented, and is supplementary to the informal discovery already received by defendant.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

Attorney for ____[name of
defendant]____

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

STATEMENT OF FACTS

_____[Describe relevant facts. Attach authority for all factual statements,
e.g., declaration by defense counsel, police report, and attach a copy as
an exhibit.]____

ARGUMENT

I

THE DEFENDANT IS ENTITLED TO INSPECT THE RECORDS OF ANY CONVICTIONS SUFFERED BY THE ALLEGED VICTIM

Good cause for discovery in a criminal case can be established by a showing that the defendant cannot readily obtain the information requested and that the requested information could assist the defendant in the preparation of his or her case. (*Hill v Superior Court* (1974) 10 C3d 812, 817.) The defendant has no ready access to the alleged victim's record of conviction other than through the discovery process. Furthermore, under Evidence Code section 788, a witness's prior felony convictions are admissible as impeachment; evidence of relevant misdemeanor misconduct involving dishonesty or moral turpitude is also admissible for impeachment in criminal proceedings. (*People v Wheeler* (1992) 4 C4th 284, 291.) No further showing of good cause is required. (*Hill v Superior Court* (1974) 10 C3d 812, 816.)

II

**THE DEFENDANT IS ENTITLED TO INSPECT ANY
INFORMATION AVAILABLE TO THE PROSECUTION
REGARDING ACTS OF VIOLENCE COMMITTED BY THE
ALLEGED VICTIM**

**Under Evidence Code section 1103, subdivision (a), specific acts
of aggression by the alleged victim are admissible to show that the**

THE FOLLOWING INFORMATION IS FOR THE USE OF THE
 OFFICIALS OF THE DEPARTMENT OF THE ARMY
 AND IS NOT TO BE RELEASED TO THE PUBLIC
 WITHOUT AUTHORITY

THE FOLLOWING INFORMATION IS FOR THE USE OF THE
 OFFICIALS OF THE DEPARTMENT OF THE ARMY
 AND IS NOT TO BE RELEASED TO THE PUBLIC
 WITHOUT AUTHORITY

alleged victim was the aggressor. Consequently, on a showing of good cause, arrest records and police records of indicating that the alleged victim has engaged in violent activity, must be disclosed. (*Engstrom v Superior Court* (1971) 20 CA3d 240, 245.) "Where a claim of self-defense is offered, and the alleged victim of an offense is claimed to have been the aggressor, information concerning arrests for specific acts of aggression by the alleged victim must be produced if available to the prosecutor." (*Ibid.*) In this case, (1) the defendant is charged with assault; (2) the defendant intends to raise a defense of self-defense, as stated in the declaration of counsel attached to this motion; and (3) the defendant's statement to the police immediately after the incident (see police report, attached to this motion as Exhibit A) indicates that the victim was the aggressor.

CONCLUSION

For the foregoing reasons, good cause for the requested disclosure exists, and this Court must enter its order directing the prosecutor to make the above-described records available to defense counsel for inspection and copying.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.]

See §1.9; Crim Law §18.5.]

DECLARATION OF COUNSEL IN SUPPORT OF DISCOVERY MOTION

_____[Name]____, attorney for defendant ____[name]____, declares under penalty of perjury that:

1. ____[He/she]____ is the attorney representing the defendant in this case;

2. ____[The defendant's statement to the police contains evidence that the victim was the aggressor in this case and the defendant acted in self-defense]____ J ____[the victim has a reputation for violence in the community/there is evidence in the police report that just before the shooting the victim threatened to kill the defendant.]____

3. Declarant is informed and believes that records of violent conduct by the alleged victim are:

(a) In the actual or constructive possession of the District Attorney of _____ County;

(b) Not available to defendant or __[his/her]__ counsel in the exercise of due diligence; and

(c) Necessary for the preparation of defendant's case for jury trial.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

Comment: This motion may be made only when there is a potential issue about the alleged victim's conduct, typically when the defendant asserts a claim of self-defense. A separate and specific request for such information is necessary because the issue arises only when there is a question about the alleged victim's conduct. It requires a specific, factual showing of good cause.

Cross-Reference: On discovery generally, see Crim Law, chap 11.

§11.14 N. Defense Ex Parte Motion for Production of Booking Photo or Latent Fingerprints

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT:

The defendant, by counsel, asks the Court for an ex parte order directing __[name of law enforcement agency]__ **to release a copy of** __[the defendant's booking photo/the defendant's fingerprints and any latent fingerprints taken from the scene of the above-entitled case]__. **This motion is based on the attached supporting memorandum, and on the court records and pleadings in the court files for this case.**

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____Attorney for _____[name of
defendant]____

[The supporting memorandum of points and authorities should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

The defense is entitled to a copy of _____[the defendant's fingerprints/ the latent fingerprints lifted at the scene of the crime charged against the defendant]____. (Penal Code section 1054.1(c).)

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____Attorney for _____[name of
defendant]____

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF _____

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff

vs

_____[Name]____,

Defendant

Dept. _____[number]____

No. _____[case number]____

[PROPOSED] ORDER FOR
PRODUCTION OF

_____[BOOKING PHOTO/LATENT
FINGERPRINTS]____

TO CONSOLIDATED CRIMINAL RECORDS, __[NAME OF POLICE OR SHERIFF'S DEPARTMENT]__:

[Use for booking photo or fingerprint card]

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the Consolidated Criminal Records Department of the __[name of police or sheriff's department]__ turn over to __[name of investigator, or an investigator of the Public Defender's Office]__ a copy of the __[booking photo/booking fingerprint card]__ of the defendant whose name, and date of birth are below.

[Use for fingerprints]

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the Consolidated Criminal Records Department of the __[name of police or sheriff's department]__ provide access to latent fingerprints for the incident occurring on __[date]__, described in __[name of law enforcement agency]__ Report No. __[number]__, dated __[date]__, and provide legible copies of those latent prints to __[name of defense investigator, or an investigator of the Public Defender's Office]__.

NAME OF DEFENDANT: __[name]__

DOB: __[date of birth]__

IT IS SO ORDERED.

Date: _____

_____[Signature of Judge]____

_____[Typed name]____

Judge of the Superior Court

Comment: It is common in many counties for the defense to request booking photos and fingerprints through ex parte orders rather than requesting them from the prosecutor; if that is the practice, a formal motion is not required. A proposed order is attached to the motion.

Cross-Reference: For further discussion of ex parte motions, see Crim Law §11.16.

§11.15

O. Request for Disclosure of Juvenile Case File (Judicial Council Form JV-570)

JV-570**Request for Disclosure of Juvenile Case File**

If you are requesting a court order to obtain the juvenile case file of a child who is alive, fill out all items on this form, and file it with the court. You must also fill out and file Proof of Service—Request for Disclosure (form JV-569).

If you are a member of the public requesting the juvenile case file of a child who is deceased, you can:

- a. *Fill out items 1–4 and 7 on this form and file it with the court. You must then provide a copy of this form to the Custodian of Records of the county child welfare agency, who will then provide notice of this request.*

Or

- b. *Do not complete the form and request the juvenile case file from the child welfare agency under Welfare and Institutions Code section 10850.4.*

- ① Your name: _____
 Relationship to child (if any): _____
 Street address: _____
 City: _____ State: _____ Zip: _____
 Telephone number: _____
 Lawyer (if any) (name, address, telephone numbers, and State Bar number): _____

- ② Name of child (if known): _____

- ③ Child's date of birth (if known): _____

- ④ a. ☐ A petition regarding the child in ② has been filed under
☐ Welfare and Institutions Code section 300
☐ Welfare and Institutions Code section 601
☐ Welfare and Institutions Code section 602 or
 b. ☐ I believe the child in ② died as a result of abuse or neglect. Approximate date of death: _____
If you checked box b, you may skip items 5 and 6.

Note: You must provide a copy of this form to all interested parties if you know their names and addresses.

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of _____

Fill in case number if known:

Case Number: _____

Judicial Council of California, www.courtinfo.ca.gov
 Revised January 1, 2009, Mandatory Form
 Welfare and Institutions Code, § 527
 California Rules of Court, rules 5.552, 5.553

Request for Disclosure of Juvenile Case File CEB

JV-570, Page 1 of 2



Your name: _____	Case Number: _____
------------------	--------------------

5 The records I want are: *(Describe in detail. Attach more pages if you need more space.)*

☐ Continued on Attachment 5.

6 The reasons for this request are:

a. ☐ Civil court case pending in *(name of county)*: _____
 Case number: _____ Hearing date: _____

b. ☐ Criminal court case pending in *(name of county)*: _____
 Case number: _____ Hearing date: _____

c. ☐ Juvenile court case pending in *(name of county)*: _____
 Case number: _____ Hearing date: _____

d. ☐ Other *(specify)*: _____
 Case number: _____ Hearing date: _____

7 I need the records because: *(Describe in detail. Attach more pages if you need more space.)*

☐ Continued on Attachment 7.

8 I declare under penalty of perjury under the laws of the State of California that the information in this form is true and correct. This means that if I lie on this form, I am guilty of a crime.

Date: _____

Type or print your name

▼

Sign your name

Comment: Use of this Judicial Council form is mandatory. Cal Rules of Ct 1.31.

Cross-Reference: On the confidentiality of juvenile court records, see California Criminal Law Procedure and Practice §§41.13–41.13A, 56.1, and 56.7 (Cal CEB).

§11.16 P. Acknowledgment of Discovery

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

ACKNOWLEDGMENT OF DISCOVERY

Case No. __[number]__

__[People v/In re name of defendant]__

Date: _____

I, the undersigned, declare that I am the __[prosecutor/attorney for defendant]__ in the above-entitled case.

I have received copies or inspected the following documents contained in the __[District Attorney's/defense attorney's]__ case file:

Documents (list those applicable)	Received Copy	Inspected Only
Arrest report(s)		
Crime report(s)		
Property report(s)		
Supplemental report(s)		
Chemist report(s)		
Coroner's protocol		
Booking report(s)		
Accident report(s)		
Retest(s) of evidence		
Witness interview(s)		
Other reports (specify)		

__[Signature of attorney]__

__[Typed name]__

Attorney for __[name of defendant]__

Comment: This form may be used to acknowledge receipt of items in response to an informal request for discovery. See §§11.1, 11.4.

Cross-Reference: See California Criminal Law Procedure and Practice §11.3 (Cal CEB).

§11.17 Q. Motion for Conditional Examination

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO __[THE PEOPLE/THE DEFENDANT]__:

PLEASE TAKE NOTICE that, on __[date]__, at __[time]__, or as soon thereafter as the matter can be heard, the __[People/defendant, name]__ will move the Court, for conditional examination of __[name of witness]__ pursuant to Penal Code sections 1335 et seq., such conditional examination to take place at a date, time, and place to be determined by the Court at the hearing on this motion.

This motion is based on the attached declaration, together with such other evidence, oral or documentary, as may be introduced at the hearing on this motion.

[Optional]

Because time is of the essence, the __[People seek/defendant seeks]__ an order shortening time under the provisions of Code of Civil Procedure section 1005.

[Continue]

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

MEMORANDUM IN SUPPORT OF MOTION FOR CONDITIONAL EXAMINATION

A WITNESS MAY BE CONDITIONALLY EXAMINED WHEN
__[SPECIFY RELEVANT GROUND]__

__[Specify relevant grounds, e.g., the witness is about to leave the state, or is so sick that he or she will not be able to testify. Pen C §1336.]__

__[NAME]__, A WITNESS IN THIS CASE, WILL BE UNAVAILABLE TO TESTIFY AT TRIAL BECAUSE __[STATE GROUND]__; THIS GROUND SUPPORTS THE __[PEOPLE'S/DEFENDANT'S]__ REQUEST FOR A CONDITIONAL EXAMINATION OF THAT WITNESS

__[Explain why the witness will be unavailable. Refer to the facts in the declaration attached that is required by Pen C §§1336–1338.]__

CONCLUSION

For the above-stated reasons, the __[People request/Defendant requests]__ that this Court order that a conditional examination of __[name of witness]__ be held at a date, time, and place to be determined by this Court at the hearing on this motion.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.

See §1.9; Crim Law §18.5.]

DECLARATION IN SUPPORT OF MOTION FOR CONDITIONAL EXAMINATION OF __[NAME]__

__[Name of declarant]__, being duly sworn, deposes and says:

That __[he/she]__ is __[tell who declarant is, e.g., a Deputy District Attorney for the County of Los Angeles]__;

That there is now pending before this Court a charge of violating section __[number]__ of the California _____ Code against the above-named defendant; that said charge is now at the __[tell stage, e.g., arraignment]__ stage.

That in this action the __[People/defendant]__ must have the testimony of __[name of witness]__ because __[explain why, e.g., the person is the victim in the action and her testimony is material to the case and necessary to prove the elements of the offense]__.

That this witness will be unavailable to testify because __[*explain why*]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[*Signature of declarant*]__

__[*Typed name*]__

__[*Title of declarant if in public office*]__

Comment: The motion for conditional examination of a witness requires no less than three days' notice to the opposing party. Pen C §1338. The affidavit attached to the motion satisfies the requirements of Pen C §1337 as to its contents. A witness is conditionally examined as if testifying at trial. See Pen C §§1335–1345. The defendant has the right to be present. Pen C §1340. A magistrate, prosecutor, and defense attorney are present. See Pen C §1339. A court reporter takes down the proceedings, which may also be videotaped. Pen C §1343.

Cross-Reference: For discussion of conditional examinations, see Crim Law §§31.20, 54.15.

Public Records

I. OVERVIEW

A. Companion Volume §12.1

I. OVERVIEW

§12.1 A. Companion Volume

This manual is a companion volume to California Criminal Law Procedure and Practice (Cal CEB). This chapter is reserved.

Handwritten text, possibly a signature or date, appearing as "11/11/11".

Motion to Set Aside Information or Quash Indictment

I. OVERVIEW

- A. Defense Motion to Dismiss Information Under Pen C §995 **§13.1**
- B. Defense Motion to Quash Indictment Under Pen C §995 **§13.2**
- C. Memorandum in Opposition to Motion to Dismiss Under Pen C §995 **§13.3**
- D. Motion to Compel Reinstatement of Complaint (Pen C §871.5) **§13.4**
- E. Request for Preparation of Transcript **§13.5**
- F. Memorandum in Support of Motion to Reinstate Complaint **§13.6**

I. OVERVIEW

§13.1

A. Defense Motion to Dismiss Information Under Pen C §995

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

**TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY
OF _____ COUNTY, STATE OF CALIFORNIA:**

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant will move that the Court set aside the information under Penal Code section 995 because __[give the relevant ground(s) of §995: the defendant was not legally committed by the magistrate, and/or the defendant was committed without reasonable or probable cause]__.

This motion will be based on the attached supporting memorandum, the preliminary hearing transcript, and on argument at the hearing on this motion.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_____[Summarize your argument in two to three sentences.]____

STATEMENT OF FACTS

_____[State facts based only on preliminary hearing transcript, unless one of the narrow exceptions that allows you to go outside the transcript applies. Those exceptions are discussed in Crim Law §13.4. Support each statement of fact by referring to the preliminary hearing transcript by page number, or page and line number. The usual style is RT (for Reporter's Transcript) followed by the page number, e.g., RT 4; line numbers are usually preceded by a colon (e.g., RT 4: 3-17).]____

ARGUMENT

[The following general arguments may be made in a §995 motion to dismiss. For discussion of the major issues, see Crim Law, chaps 8, 13. Most §995 motions concern fact-specific issues and require research to find cases on point.]

THE INFORMATION CHARGES AN OFFENSE NOT NAMED IN THE ORDER OF COMMITMENT OR SHOWN BY THE EVIDENCE TO HAVE OCCURRED

An information may charge only an offense found by the magistrate to have occurred and named in the order of commitment, or an offense shown by the evidence to have occurred that arose out of the transaction that was the basis for the commitment on the related offense. (Penal Code section 739; *Jones v Superior Court* (1971) 4 C3d 660.)

[Describe which count was not named in the order of commitment or shown by the evidence to have occurred.]

AN OFFENSE DISMISSED BY THE MAGISTRATE AFTER A FACTUAL FINDING FATAL TO THE CHARGE MAY NOT BE RECHARGED IN THE INFORMATION

An offense dismissed by the magistrate after a factual finding fatal to the charge may not be recharged in the superior court information. (*Jones v Superior Court, supra*; *Walker v Superior Court* (1980) 107 CA3d 884.)

In this case, the magistrate **[state the magistrate's factual findings, and explain why they were factual findings and not legal findings]** .

THE RESTRICTION ON THE RIGHT TO CROSS-EXAMINE WITNESSES RESULTED IN AN ILLEGAL COMMITMENT

A defendant is denied a substantial right if defense counsel is limited in the cross-examination of the prosecution's witnesses. (*Jennings v Superior Court* (1967) 66 C2d 867. See Penal Code sections 865, 866(a).) Cross-examination may be for the purpose of raising an affirmative defense, negating an element of the offense (*Jennings v Superior Court, supra*), or impeaching a witness (*Alford v Superior Court* (1972) 29 CA3d 724). (Penal Code section 866(a).)

[Describe what cross-examination was denied the defense. Explain the purpose of the cross-examination. Hopefully, you can cross-refer to the preliminary hearing transcript page where defense counsel made an offer of proof that demonstrated the point of the cross-examination. Explain how the denied cross-examination would have fit into the above criteria, and why it was not just for purposes of discovery, which is not permitted (Pen C §866(b)).]

THE RESTRICTION ON THE RIGHT TO PRESENT A DEFENSE RESULTED IN AN ILLEGAL COMMITMENT

The defense is entitled to establish an affirmative defense at the preliminary hearing. (*Jennings v Superior Court* (1967) 66 C2d 867, 880; Penal Code section 866.) __[*Defendants have the absolute right to testify at the preliminary hearing. (People v Robles* (1970) 2 C3d 205.)]__

__[*Describe what affirmative defense counsel tried to put on at the preliminary hearing. You should be able to cross-refer to the preliminary hearing transcript page where defense counsel made an offer of proof that made clear that he or she wanted to put on an affirmative defense, and what that defense was going to be. See the affirmative defenses in Crim Law §§8.13, 32.12. If the defendant was not allowed to testify, argue that point too.*]__

THE ONLY EVIDENCE SUPPORTING THE COMMITMENT WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE

A commitment based on illegally seized evidence is not valid and must be set aside. (*Badillo v Superior Court* (1956) 46 C2d 269; *Priestly v Superior Court* (1958) 50 C2d 812.) The defendant challenged the search and seizure at the preliminary examination and objected to the introduction of __[*describe the evidence that was seized*]__ **on the grounds that** __[*state grounds*]__ **.** __[*Cite to reporter's transcript page numbers.*]__ **That evidence was nevertheless admitted and considered by the magistrate, and a holding order resulted.**

The magistrate's ruling was in error because __[*State why, citing legal authorities and tying them to the facts of your case. If you filed a memorandum in support of your Pen C §1538.5 motion at the preliminary hearing, attach a copy to this motion as an exhibit and cross-refer to it.*]__

An information must be set aside unless the reviewing court finds sufficient competent evidence to support the magistrate's conclusion that there was probable cause to believe that a crime had been committed and that the defendant committed it. (*People v Lopez* (1975) 52 CA3d 263.) The evidence must present a rational basis for believing that the defendant is guilty. (*People v Slaughter* (1984) 35 C3d 629.)

__[*Although circumstantial evidence may be considered in making the determination, all inferences must be reasonable (Williams v Superior*

Court (1969) 71 C2d 1144); and any inferences which derive from speculation, conjecture, or guesswork must be discarded (*Birt v Superior Court* (1973) 34 CA3d 934).]__

If the __[describe evidence]__ is suppressed, not enough evidence remains to support a holding order, and the information should be set aside. __[Explain why this is so.]__

__[SPECIFY ELEMENT OF OFFENSE NOT PROVEN AT PRELIMINARY HEARING, E.G., THE ELEMENT OF FORCE OR FEAR IN THE ROBBERY IN COUNT ONE]__ WAS NOT PROVEN, THEREFORE COUNT __[NUMBER]__ MUST BE DISMISSED

There must be some evidence to support each and every element of an offense, or the finding must fall. (*Panos v Superior Court* (1984) 156 CA3d 626; *People v Superior Court (Mendella)* (1983) 33 C3d 754; *People v Shirley* (1978) 78 CA3d 424.) There was no evidence at the preliminary hearing in this case to support __[Specify count and crime. Explain what element was missing. Support your argument with case law on point. See, e.g., *Rodriguez v Superior Court* (1984) 159 CA3d 821 (no showing of intent before force was used against victim); *People v Cafferio* (1989) 207 CA3d 678 (in felony-murder case, no showing of malice aforethought). See other cases in *Crim Law* §13.9.]__

THE TESTIFYING OFFICER DID NOT MEET THE REQUIREMENTS OF PENAL CODE SECTION 872(b)

In *Whitman v Superior Court* (1991) 54 C3d 1063, the Court held that Penal Code section 872(b) permits a properly qualified investigating officer to relate out-of-court statements by crime victims or witnesses, including other law enforcement personnel, without requiring the victims or witnesses to be present in court. It does not authorize a finding of probable cause based only on the testimony of a noninvestigating officer or "reader" who recites the police report of an investigating officer. The testifying officer "must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." (54 C3d at 1075.)

In this case __[describe what requirement was not met, e.g., the officer who testified did not have at least 5 years of law enforcement experience, or did not have the special training required]__. **Because Officer** __[name of officer]__ **did not have** __[describe what requirement was

missing]__ , __[*his/her*]__ testimony must be stricken. (See *Hollowell v Superior Court* (1992) 3 CA4th 391 (testimony stricken because of prosecution's failure to establish that training course was approved by POST) and Pen C §872(c), defining qualified law enforcement officer.)

THE MAGISTRATE ADMITTED MULTIPLE HEARSAY IN VIOLATION OF PENAL CODE SECTION 872(b) AND *WHITMAN v SUPERIOR COURT*

The California Supreme Court in *Whitman v Superior Court* (1991) 54 C3d 1063, expressly forbade the use of multiple hearsay. *Whitman* pointed out that Penal Code section 872(b) does not contain an exception to Evidence Code section 1201, which provides that multiple hearsay is allowed only if each level of hearsay is covered by a hearsay exception. This proscription was applied by the Court to exclude testimony in *Shannon v Superior Court* (1992) 5 CA4th 676; *People v Wimberly* (1992) 5 CA4th 439; and *Montez v Superior Court* (1992) 4 CA4th 577.

__[*Explain which officer testified to multiple hearsay at the preliminary hearing in your case, and why it was multiple hearsay.*]__

THE DENIAL OF A SUBSTANTIAL RIGHT AT THE PRELIMINARY HEARING RENDERS THE COMMITMENT ILLEGAL AND ENTITLES THE DEFENDANT TO A DISMISSAL OF THE INFORMATION

The denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. (See *People v Pompa-Ortiz* (1980) 27 C3d 519, 523.)

__[*Specify what substantial right was violated, e.g., the right to counsel, to an interpreter, or for the defendant to be present. Support the facts with relevant case law. See Crim Law, chaps 8, 13.*]__

__[*Add additional arguments.*]__

CONCLUSION

For the reasons stated above, the defendant respectfully requests that this Penal Code section 995 motion be granted and __[*specify the desired relief, e.g., counts one and two be dismissed*]__.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for name of defendant

Comment: Penal Code §995 motions are made in the superior court. Pen C §995(a). Most counties have local rules of court that specify the type of notice required, deadlines for filing the motion, the court that will hear the motion, and the days of the week and times these motions are heard. Defense counsel usually notice §995 motions orally at arraignment in superior court, and are given a date for hearing on the motion by the arraignment judge. A supporting memorandum must accompany the motion. Cal Rules of Ct 4.111; see §18.2.

While Pen C §995 motions must usually be based exclusively on the preliminary hearing transcript (see *Stanton v Superior Court* (1987) 193 CA3d 265, 270), there are exceptions (see Crim Law §13.4). Examples of some of the issues that may be raised by §995 motion are in Crim Law §§13.6–13.23. Examples of issues that may not be raised by a Pen C §995 motion are in Crim Law §13.21.

Preliminary hearing transcripts must be filed with the county clerk within 10 calendar days of the close of the preliminary hearing (Pen C §869(e)); the §995 judge usually has a copy of the transcript in the court file. Usually, the defense and prosecution are sent a copy of the transcript a few days before the superior court arraignment. An attorney unfamiliar with practice in a particular county should inquire whether a copy of the preliminary hearing transcript must be attached to the motion.

When a Pen C §1538.5 motion is made at the preliminary hearing, it may be challenged by Pen C §995 motion; an appropriate Pen C §1538.5 motion may also be made in superior court. *People v Laiwa* (1983) 34 C3d 711. See Crim Law §16.25.

Cross-Reference: For further discussion of Pen C §995 motions, see Crim Law, chap 13. See also Crim Law, chap 8 on preliminary hearings.

§13.2

B. Defense Motion to Quash Indictment Under Pen C §995

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court quash the indictment in the above-titled case because __[choose the applicable argument(s): (1) the indictment was not found, presented, or endorsed as required by the Penal Code; (2) the defendant has been indicted without reasonable or probable cause; (3) the indictment was based on evidence (other than the sworn testimony of a law enforcement officer, qualified under Penal Code §939.6(c), relating the out-of-court statement of a declarant and offered for the truth of the matter asserted) that would not be admissible over objection at the trial of a criminal case, and without that evidence there is not sufficient evidence to support an indictment]__. **This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.**

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

__[Summarize your argument in two to three sentences.]__

STATEMENT OF FACTS

__[Summarize the facts concerning the crime(s) charged as brought out in testimony before the grand jury. Identify in some manner (e.g., in

parentheses following the relevant statements) testimony and evidence (other than the sworn testimony of a law enforcement officer, qualified under Penal Code §939.6(c), relating the out-of-court statement of a declarant and offered for the truth of the matter asserted) that would not have been admissible over objection. Follow each summary of particular testimony with a citation (usually in parentheses) to the page (and line, if you wish) of the grand jury transcript on which that testimony may be found.]__

[Example]

David Jones, the manager of the Villa Motel, testified before the grand jury in this case to the following information. On the morning of June 14, 2004, Mr. Jones was notified by a maid that the television was missing from Room 24 of the Villa Motel. (RT 5) (The maid did not testify. The only testimony concerning the fact that the TV was missing was that of Mr. Jones.)

__[State what charges were found against the defendant by the grand jury, and on what date.]__

ARGUMENT

[The following argument alleges that the indictment was based on evidence (other than officer testimony specifically permitted under Penal Code §939.6(c)) that would not be admissible over objection at the trial of a criminal case. See Crim Law §13.22 for discussion of other possible errors in grand jury proceedings, and the forms in §§9.1–9.2 of this forms manual.]

THE GRAND JURY MAY NOT RECEIVE EVIDENCE (OTHER THAN OFFICER TESTIMONY SPECIFICALLY PERMITTED UNDER PENAL CODE SECTION 939.6(c)) THAT WOULD BE INADMISSIBLE ON OBJECTION

A grand jury may not receive evidence (other than officer testimony specifically permitted under Penal Code section 939.6(c)) that would be inadmissible on objection at the trial of a criminal case. (Penal Code section 939.6(b)–(c).) This means that a proper foundation must be laid for the admission of documentary evidence, and that all other evidentiary requirements must be met by the prosecutor.

AFTER ELIMINATING EVIDENCE (OTHER THAN OFFICER TESTIMONY SPECIFICALLY PERMITTED UNDER PENAL CODE SECTION

939.6(c)) THAT WOULD HAVE BEEN INADMISSIBLE ON OBJECTION, AN INDICTMENT MAY BE SUSTAINED ONLY IF THERE REMAINS SUFFICIENT ADMISSIBLE EVIDENCE TO SUPPORT IT

The hearsay exceptions of section 30(b) of article I of the California Constitution and Penal Code section 872(b) do not apply to grand jury proceedings. By statute, with the exception for officer testimony specifically permitted under Penal Code section 939.6(c), the normal rules of hearsay apply in grand jury proceedings (Penal Code section 939.6(b)–(c)), and an indictment may not be based entirely on hearsay evidence (*Cook v Superior Court* (1970) 4 CA3d 822).

[Continue with separate headings, discussion, and citation to authority concerning each alleged item of inadmissible evidence presented to the grand jury, as in the following example.]

THE TESTIMONY OF MR. JONES THAT A TELEVISION WAS STOLEN IS HEARSAY

The only evidence presented to the grand jury that returned the indictment in this case concerning a stolen television was the testimony of Mr. Jones that a maid told him that the television was missing from Room 24 of the Villa Motel, of which Mr. Jones is the manager. (RT 5) The maid did not testify. The only testimony concerning the fact that the TV was missing was that of Mr. Jones; that testimony is hearsay.

Hearsay evidence is “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evidence Code section 1200(a).) The maid’s statement to Mr. Jones was hearsay.

THERE IS NO EXCEPTION TO THE HEARSAY RULE THAT WOULD HAVE PERMITTED THE GRAND JURY TO BASE THE INDICTMENT ON THE HEARSAY TESTIMONY OF MR. JONES

There are exceptions to the rule that hearsay is inadmissible; there are none, however, that apply to the testimony of Mr. Jones. The hearsay exceptions of section 30(b) of article I of the California Constitution and Penal Code section 872(b), which allow hearsay at preliminary hearings, do not apply to grand jury proceedings. The exception for officer testimony under Penal Code section 939.6(c) does not

apply here because Mr. Jones is not an officer. Otherwise, by statute, the normal rules of hearsay apply in grand jury proceedings. (Penal Code section 939.6(b).)

AFTER ELIMINATING MR. JONES' TESTIMONY CONCERNING THE STOLEN TV, THERE IS NO EVIDENCE THAT A TV WAS STOLEN, AND THEREFORE NO BASIS FOR THE GRAND JURY CHARGE THAT A TV WAS STOLEN FROM THE VILLA MOTEL BY THE DEFENDANT

There is no evidence to prove that a television was stolen from the Villa Motel, after eliminating the testimony of Mr. Jones. There is thus no proof that the TV set found in the trunk of the defendant's car had been stolen.

[Continue]

A MOTION TO QUASH AN INDICTMENT BECAUSE THERE IS INSUFFICIENT COMPETENT EVIDENCE TO SUPPORT IT AFTER ELIMINATING EVIDENCE INADMISSIBLE ON OBJECTION IS PROPERLY MADE FOR THE FIRST TIME BY A MOTION PURSUANT TO PENAL CODE SECTION 995

An indictment based on insufficient admissible evidence may be challenged by a motion to dismiss pursuant to Penal Code section 995. (See *People v Backus* (1979) 23 C3d 360; *Cook v Superior Court* (1970) 4 CA3d 822.) Further, because a defendant has no opportunity to object to hearsay presented to a grand jury, that hearsay may be objected to for the first time in a motion pursuant to Penal Code section 995. (*Dong Haw v Superior Court* (1947) 81 CA2d 153.)

CONCLUSION

Defendant moves to __ [quash the indictment/quash specify the counts to be quashed if not all counts are based on inadmissible evidence] __ because there is insufficient admissible evidence to support __ [it/them] __ based on the reasons stated above.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

Comment: See the Comment to §13.1 for discussion of Pen C §995 motions in general. In general, the prosecution argues that, whatever error occurred in the grand jury proceedings, it was not extreme enough to constitute a denial of due process. See *People v Backus* (1979) 23 C3d 360, 391. With regard to the existence of incompetent evidence presented to the grand jury, even if the grand jury heard evidence that would be inadmissible at trial, the indictment is *not* void if sufficient competent evidence to support the indictment was also presented to the grand jury. Pen C §939.6(b). See also *People v Olf* (1961) 195 CA2d 97.

If counsel wishes to quash the indictment based on error in grand jury composition, see the form in §9.1. A motion to quash the indictment because the prosecutor did not inform the jury of evidence reasonably tending to negate guilt (commonly called a *Johnson* motion) is in §9.2.

Cross-Reference: See discussion of Pen C §995 motions in Crim Law, chap 13, and discussion of grand jury proceedings in Crim Law, chap 9.

§13.3 C. Memorandum in Opposition to Motion to Dismiss Under Pen C §995

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS UNDER PENAL CODE SECTION 995

SUMMARY OF ARGUMENT

__ *[Summarize your argument in two to three sentences, concluding with your position that the defense motion should be denied.]* __

SUMMARY OF FACTS

[Select one of the following paragraphs.]

The defense statement of facts is hereby adopted by reference.

[Or]

The defense statement of facts is hereby adopted by reference and augmented as follows: __ *[Add additional facts from preliminary hearing or grand jury proceedings, supported by reference to the Reporter's Transcript, page, or page and line, e.g., RT 2; or RT 2, Lines 3–14; or RT 2: 3–14.]* __

[Or]

The testimony given __[at the preliminary hearing/before the grand jury]__, **together with all reasonable inferences to be drawn therefrom, indicates the following as to Count** __[specify count number]__ **of the** __[Information/Indictment]__: __[State only facts based on preliminary hearing or grand jury transcript. Refer to the Reporter's Transcript, page, or page and line.]__

[Continue]

ARGUMENT

[The following are examples of general arguments that may be made in opposition to a §995 motion to dismiss an information or indictment. For discussion of the major issues, see California Criminal Law Procedure and Practice, chaps 8, 13 (Cal CEB). Most §995 motions concern fact-specific issues and require research in case law to find cases on point.]

A PENAL CODE SECTION 995 MOTION IS NOT THE APPROPRIATE PROCEDURE FOR THE DEFENSE ARGUMENT

__[State why a §995 motion is inappropriate. Examples include a defense argument based on information that goes outside the preliminary hearing transcript (*Stanton v Superior Court* (1987) 193 CA3d 265, 270); a juvenile court order that a minor must be tried as an adult (*Ramona R. v Superior Court* (1985) 37 C3d 802); and misjoinder (*People v Cummings* (1959) 173 CA2d 721). For other examples, see *Crim Law* §13.21.]__

NO OBJECTION WAS MADE AT THE PRELIMINARY HEARING

__[State why an objection was required.]__

THE DEFENSE IN ITS PENAL CODE SECTION 995 MOTION USED THE WRONG STANDARD FOR REVIEWING THE MAGISTRATE'S RULING

The defense supports its argument that the evidence is insufficient by citing cases that concern *convictions*. Review of a conviction requires a different and much higher standard (beyond a reasonable doubt) than does review of a holding order. A holding order must be upheld on Penal Code section 995 review as long as the reviewing Court finds a rational ground to support the holding order. (*People v Slaughter* (1984) 35 C3d 629; *People v Caffero* (1989) 207 CA3d 678.)

Therefore, the defense arguments regarding the sufficiency of the evidence as to Count __[number]__ are irrelevant and should be disregarded.

THE MAGISTRATE MADE LEGAL FINDINGS, NOT FACTUAL FINDINGS

Legal findings are not binding on the prosecution after the preliminary hearing; factual findings are binding. (*People v Uhlemann* (1973) 9 C3d 662.) When, as in this case, the magistrate has accepted the evidence but concluded that on legal grounds one or more charges have not been proven, that is a legal conclusion. Examples are: __[Give examples close to the facts of your case that show that the magistrate's legal ruling was wrong, and relate them to your case. See, e.g., *People v Superior Court (Henderson)* (1986) 178 CA3d 516; *People v Superior Court (Gibson)* (1980) 101 CA3d 551.]__

[Add if applicable]

Further, if a magistrate focuses on one discrepancy and ignores other far more powerful evidence, any factual findings made at the preliminary hearing are not controlling. (*People v McGlothen* (1987) 190 CA3d 1005.) __[Describe how facts of your case fit within this argument.]__

[Continue]

ANY ERROR WAS MINOR AND THEREFORE NOT A DENIAL OF A SUBSTANTIAL RIGHT

For the Court to find that a defendant was denied a substantial right at the preliminary hearing, the error must be more than a minor one. (*People v Sheets* (1967) 251 CA2d 759, 767.) __[Explain why the error in your case, if any, was minor. Cite cases close to the facts of your case.]__

CONCLUSION

__[If there was a minor error of omission, an ambiguity, or a technical defect that can be corrected without a rehearing of a substantial portion of the evidence, you may want to admit the error and ask the court to remand the case to the committing magistrate to correct it, based on Pen C §995a(b)(1). Alternatively, you may want to wait until the hearing on the §995 motion to make that request.]__

For the reasons stated above, the People respectfully request that the defendant's motion under Penal Code section 995 be denied.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

Comment: Unless otherwise ordered or provided, opposition papers must include a memorandum. Cal Rules of Ct 4.111; see §18.2. Local rules should be consulted for other requirements.

Cross-Reference: For discussion of the §995 opposition memorandum, substantive §995 issues, and possible actions if the §995 motion is granted, see Crim Law, chap 13.

§13.4 D. Motion to Compel Reinstatement of Complaint (Pen C §871.5)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE HONORABLE __[NAME OF MAGISTRATE]__, JUDGE OF THE SUPERIOR COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA, COUNTY OF _____, AND TO THE DEFENDANT:

[Option 1]

PLEASE TAKE NOTICE that on __[date]__, at __[time]__, in Department __[number]__ of the Superior Court, or as soon thereafter as the matter can be heard, the People of the State of California will move under Penal Code section 871.5 to compel reinstatement of __[specify what you want reinstated, e.g., counts 2 and 3 of the complaint in Action No. 871999 of the above-entitled Superior Court, and reinstatement of the custodial status of the defendant under the same terms and conditions as when she/he]__ __[last appeared before the magistrate]__. Such counts were discharged on __[date]__ pursuant to Penal Code section 871.

[Option 2]

PLEASE TAKE NOTICE that pursuant to Penal Code section 871.5, the People of the State of California hereby move this Court to compel reinstatement of the complaint in Action __[number]__ of the above-entitled Superior Court __[, and reinstatement of the prior custodial status of the defendant]__. Such action was discharged pursuant to Penal Code section 871.

[Continue]

In connection with the above motion, it is requested that this Court set a date for hearing on this motion no sooner than __[number of days]__ court days from this date.

This motion is based on this notice, the brief or briefs to be filed before the date of the hearing on this matter, the preliminary hearing transcript in this case, and argument on this motion.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

Comment: Depending on local practice, the prosecution should either obtain a hearing date for the motion from the superior court clerk before formally noticing the motion, or file the notice requesting a date. The motion must be made in the superior court within 15 calendar days of the dismissal. Pen C §871.5(a); *People v Dethloff* (1992) 9 CA4th 620. A hearing on the motion, however, need not occur within the 15-day period. *People v Dianda* (1986) 178 CA3d 174. Notice must be given to the magistrate who ordered the dismissal, and to the defendant. Pen C §871.5(a)–(b).

Cross-Reference: See California Criminal Law Procedure and Practice §§8.44, 13.32–13.36 (Cal CEB).

§13.5 E. Request for Preparation of Transcript

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

The People of the State of California hereby request that there be prepared a written transcript of the court reporter's notes of the proceedings at the preliminary hearing in the above-entitled action, which took place on __[date]__, in Department No. __[number]__ of this Court. Penal Code section 871.5(d) provides that the reporter shall immediately transcribe his or her shorthand notes pursuant to Penal Code Section 869, and file with the Clerk of the Superior Court an original plus one copy, and as many copies as there are defendants. The reporter is entitled to compensation in accordance with the provisions of Section 869.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

Comment: The prosecution must file a written request for a transcript of the preliminary hearing within 10 calendar days of the dismissal. Pen C §871.5(d). Copies of the transcript must be provided to the prosecutor and all defendants, without cost, in the manner prescribed in Pen C §869. Pen C §871.5(d).

§13.6 F. Memorandum in Support of Motion to Reinstatement Complaint

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

MEMORANDUM IN SUPPORT OF MOTION TO REINSTATE COMPLAINT

SUMMARY OF ARGUMENT

__[Summarize your argument in two to three sentences.]__

STATEMENT OF FACTS

__[Summarize the facts concerning the testimony at the preliminary hearing that are relevant to the charges dismissed. After each summary of

*particular testimony, cite the page (and line, if you wish) of the preliminary hearing transcript on which that testimony may be found (for example, page 4, lines 3 through 20, are typically cited as "RT 4:3-20"). You may want to ask the superior court to take judicial notice of records in the action below, e.g., the Clerk's Docket and Minutes, and also attach certified copies to your motion. These attachments are usually labeled "Exhibits" and given a number, e.g., "Exhibit 1."]*__

ARGUMENT

__[State your arguments for reinstatement of each dismissed count. These arguments should be very fact-specific. See generally discussion of Pen C §871.5 motions in California Criminal Law Procedure and Practice §§13.32-13.36 (Cal CEB).]__

CONCLUSION

It appears clear that the dismissal of __[this action/count(s) number(s)]__ in the court below was required by no provision of law and was thus totally improper. As such, it is equally clear that "as a matter of law, the magistrate erroneously dismissed the action." (Penal Code section 871.5(b).) Accordingly, we request reinstatement of __[specify which counts, and whether you want the custodial status of the defendant restored]__.

Date: _____

Respectfully submitted,

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
_____[Name]_____,
Defendant.

Dept. _____[number]_____
No. _____[case number]_____
**[PROPOSED] ORDER FOR
REINSTATEMENT OF
COMPLAINT**

**TO THE HONORABLE _____[NAME OF MAGISTRATE]_____, IN _____[HIS/
HER]_____ OFFICIAL CAPACITY AS MAGISTRATE, AND TO THE CLERK
OF THE SUPERIOR COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF CALIFORNIA, COUNTY OF _____:**

The motion of the People of the State of California for reinstatement of _____[specify what is being reinstated, e.g., the complaint, or counts 2 and 3 and the custodial status of the defendant]_____ under Penal Code section 871.5 in the above-entitled action having come on for hearing before me on this date, and sufficient cause to reinstate the complaint and the custodial status of the defendant appearing in the record of the proceedings below, therefore

YOU ARE ORDERED:

1. To resume proceedings in this action on _____[date]_____, at _____[time]_____, in Department _____[number]_____, or at such time on that date as may be convenient to the Court and the parties (Penal Code section 871.5(e)); and

2. To vacate your order of _____[date]_____ discharging _____[state what was discharged, e.g., the defendant pursuant to Penal Code §1050]_____; and

3. To reinstate the complaint charging defendant with violation of _____[specify code sections]_____; and

4. To set, in your discretion, an appropriate bail for the reinstated offenses.

Date: _____

_____[Signature of Judge]____

_____[Typed name]____

Judge of the Superior Court

Comment: It is common under either local rules or practice for the first court date on this motion to be a setting date, at which time the court sets briefing dates.

A prosecutor may challenge a magistrate's dismissal under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or under Veh C §41403, of a complaint, a count, or a special circumstances allegation by noticing a motion in superior court to compel the magistrate to reinstate the complaint (or the portion that was dismissed) and reinstate the defendant's custodial status. Pen C §871.5(a); *Ramos v Superior Court* (1982) 32 C3d 26, 37. The prosecution may only seek reinstatement on the basis that, as a matter of law, the magistrate erroneously dismissed the action or a part thereof. *People v Shrier* (2010) 190 CA4th 400, 409.

A Pen C §871.5 motion may not be used to attack a magistrate's *factual* (as opposed to his or her *legal*) findings. *People v Childs* (1991) 226 CA3d 1397, 1405. When the magistrate made findings of fact favorable to the defense at the preliminary hearing, the superior court judge is bound by those findings if they are supported by substantial evidence. *People v Shrier, supra*; *People v Plumlee* (2008) 166 CA4th 935, 939. See *People v Slaughter* (1984) 35 C3d 629, 633. Section 871.5 review is also not available after dismissal of a portion of a complaint if it can be charged in the information under Pen C §739. Pen C §871.5(a). Section 871.5 is the only method of reviewing a case dismissed by the magistrate. *People v Mimms* (1988) 204 CA3d 471, 479.

The magistrate may be ordered to hold the defendant to answer. See *People v Childs* (1991) 226 CA3d 1397, 1408.

A defense ruling on a §871.5 motion is a bar to refile the dismissed complaint or portion of the complaint. Pen C §871.5(c). The prosecution may, however, appeal such a ruling under Pen C §1238(a)(9). Pen C §871.5(f).

Cross-Reference: For further discussion, see Crim Law §§13.32–13.36.

14

Pretrial and Trial Publicity

I. OVERVIEW

- A. Media Request to Photograph, Record, or Broadcast (Judicial Council Form MC-500) **§14.1**
- B. Order on Media Request to Permit Coverage (Judicial Council Form MC-510) **§14.2**

I. OVERVIEW

§14.1

A. Media Request to Photograph, Record, or Broadcast (Judicial Council Form MC-500)

MEDIA AGENCY (name): CHANNEL/FREQUENCY NO.: PERSON SUBMITTING REQUEST (name): ADDRESS: TELEPHONE NO.: <small>Insert name of court and name of judicial district and branch court, if any</small>		MC-500 <small>FOR COURT USE ONLY</small>
TITLE OF CASE:		
NAME OF JUDGE:		
MEDIA REQUEST TO PHOTOGRAPH, RECORD, OR BROADCAST		
		CASE NUMBER

1. PORTION OF THE PROCEEDINGS TO BE COVERED (e.g., particular witnesses at trial, the sentencing hearing, etc.):
2. DATE OF PROPOSED COVERAGE (specify): . (File this form at least five court days before the proposed coverage date. If not feasible, explain good cause for noncompliance):
3. TYPE OF COVERAGE
 - a. ☐ TV camera and recorder
 - b. ☐ Still camera
 - c. ☐ Motion picture camera
 - d. ☐ Audio
 - e. ☐ Other (specify):
4. ☐ SPECIAL REQUESTS OR ANTICIPATED PROBLEMS (specify):
5. ☐ INCREASED COSTS. This agency acknowledges that it will be responsible for increased court-incurred costs, if any, resulting from this media coverage (estimate): \$
☐ Amount unknown
6. PROPOSED ORDER. A completed, proposed order on Judicial Council form MC- 510 is attached (required by Cal. Rules of Court, rule 1.150).

CERTIFICATION

I certify that if the court permits media coverage in this case, all participating personnel in this media agency will be informed of and will abide by the provisions of California Rules of Court, rule 1.150, the provisions of the court order, and any additional restrictions imposed by the court.

Date:

.....
 (TYPE OR PRINT NAME)

 (SIGNATURE)

Telephone No.:

 (SUPERVISORY POSITION IN MEDIA AGENCY)

NOTICE OF HEARING (A hearing is optional.)

A HEARING will be held as follows:

Date:	Time:	Dept./Div.:	Room:
Address of the Court:			

Clerk, by _____, Deputy

Form Adopted for Mandatory Use
 Judicial Council of California
 MC-500 [Rev. January 1, 2007]

MEDIA REQUEST TO PHOTOGRAPH, RECORD, OR BROADCAST

©EB

Cal. Rules of Court, rule 1.150
 www.courtinfo.ca.gov

Comment: The use of this form is mandatory. Media coverage of a criminal trial does not in itself violate due process. *Chandler v Florida*

(1981) 449 US 560, 101 S Ct 802. Factors the court should consider in responding to a request for media coverage are listed in Cal Rules of Ct 1.150. A media outlet that wants to photograph a judicial proceeding must make the request on this Judicial Council form. See Cal Rules of Ct 1.150(e)(1).

Cross-Reference: For discussion of pretrial and trial publicity, see California Criminal Law Procedure and Practice, chap 14 (Cal CEB).

ORDER OF MEDIA REQUEST TO PERMIT COVERAGE

1. Name of media outlet: _____

2. Name of reporter: _____

3. Title of reporter: _____

4. Address of media outlet: _____

5. City: _____ State: _____ Zip: _____

6. Telephone number: _____

7. Fax number: _____

8. E-mail address: _____

9. I am requesting coverage of the following proceeding: _____

10. I am requesting coverage of the following proceeding: _____

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§14.2

B. Order on Media Request to Permit Coverage (Judicial Council Form MC-510)

MEDIA AGENCY (name): CHANNEL/FREQUENCY NO. PERSON SUBMITTING REQUEST (name): ADDRESS <div style="text-align: right;">TELEPHONE NO</div>	FOR COURT USE ONLY
Insert name of court and name of judicial district and branch court, if any	
TITLE OF CASE:	
NAME OF JUDGE:	
ORDER ON MEDIA REQUEST TO PERMIT COVERAGE	CASE NUMBER

AGENCY MAKING REQUEST (name):

1. a. ☐ No hearing was held.
 b. ☐ Date of hearing: _____ Time: _____ Dept./Div.: _____ Room: _____
2. The court considered all the relevant factors listed in subdivision (e)(3) of California Rules of Court, rule 1.150 (see reverse).
3. ☐ **THE COURT FINDS** (findings or a statement of decision are optional): ☐ Attached ☐ As follows:

THE COURT ORDERS

4. The request to photograph, record, or broadcast is
- a. ☐ **denied.**
- b. ☐ **granted** subject to the conditions in rule 1.150, California Rules of Court, **AND** the following:
- (1) ☐ The local rules of this court regulating media activity outside the courtroom (copy attached).
- (2) ☐ The order of the presiding or supervising judge regulating media activity outside the courtroom (copy attached).
- (3) ☐ Payment to the clerk of increased court-incurred costs of (specify): \$ _____ ☐ to be determined.
- (4) ☐ The media agency shall demonstrate to the court that the proposed personnel and equipment comply with California Rules of Court, rule 1.150, and any local rule or order.
- (5) ☐ Personnel and equipment shall be placed ☐ as directed ☐ as indicated in the attachment ☐ as follows (specify): _____
- (6) (i) ☐ The attached statement of agreed pooling arrangements is approved.
 (ii) ☐ A statement of agreed pooling arrangements satisfactory to the court shall be filed before coverage begins.
- (7) ☐ This order
 (i) ☐ shall not apply to allow coverage of proceedings that are continued.
 (ii) ☐ shall apply to allow coverage of proceedings that are continued.
- (8) ☐ Other (specify): _____
5. Coverage granted in item 4b is permitted in the following proceedings:
- a. ☐ All proceedings, except those prohibited by California Rules of Court, rule 1.150, and those proceedings prohibited by further court order.
- b. ☐ Only the following proceedings (specify type or date or both): _____
6. ☐ The order made on (date): _____ is ☐ terminated ☐ modified as follows (specify): _____

 7. ☐ Number of pages attached: _____

Date: _____

(See reverse for additional information)

JUDGE _____

Page 1 of 2

 Form Adopted for Mandatory Use
 Judicial Council of California
 MC-510 (Rev. January 1, 2007)

ORDER ON MEDIA REQUEST TO PERMIT COVERAGE

 Call Rules of Court rule 1.150
 www.courtinfo.ca.gov

MC-510

CASE NAME: _____	CASE NUMBER: _____
---------------------	-----------------------

FACTORS CONSIDERED BY THE JUDGE IN MAKING THIS ORDER (Rule 1.150)

- | | |
|--|--|
| 1. Importance of maintaining public trust and confidence in the judicial system | 11. Effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness |
| 2. Importance of promoting public access to the judicial system | 12. Effect on excluded witnesses who would have access to the televised testimony of prior witnesses |
| 3. Parties' support of or opposition to the request | 13. Scope of the coverage and whether partial coverage might unfairly influence or distract the jury |
| 4. Nature of the case | 14. Difficulty of jury selection if a mistrial is declared |
| 5. Privacy rights of all participants in the proceeding, including witnesses, jurors, and victims | 15. Security and dignity of the court |
| 6. Effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding | 16. Undue administrative or financial burden to the court or participants |
| 7. Effect on the parties' ability to select a fair and unbiased jury | 17. Interference with neighboring courtrooms |
| 8. Effect on any ongoing law enforcement activity in the case | 18. Maintaining orderly conduct of the proceeding |
| 9. Effect on any unresolved identification issues | 19. Any other factor the judge deems relevant |
| 10. Effect on any subsequent proceedings in the case | |

PROHIBITED COVERAGE (Rule 1.150)

This order does not permit photographing, recording, or broadcasting of the following in the court:

- | | |
|--|---|
| 1. The jury or the spectators | 5. A conference between counsel and the judge at the bench ("sidebars") |
| 2. Jury selection | 6. A proceeding closed to the public |
| 3. A conference between an attorney and a client, witness, or aide | 7. A proceeding held in chambers |
| 4. A conference between attorneys | |

MEDIA PERSONNEL AND EQUIPMENT (Rule 1.150)

NOTE: These requirements apply unless the judge orders otherwise. Refer to the order for additional requirements.

- | | |
|--|--|
| 1. No more than one television camera | 6. No distracting sounds or lights |
| 2. No more than one still photographer | 7. No visible signal light or device that shows when equipment is operating |
| 3. No more than one microphone operator and no obtrusive microphones or wiring | 8. No disruption of proceedings, nor public expense, to install, operate, or remove modifications to existing sound and lighting systems |
| 4. No operator entry or exit or other distraction when the court is in session | 9. No media agency insignia or marking on equipment or clothing |
| 5. No moving equipment when the court is in session | |

SANCTIONS FOR VIOLATING THIS ORDER (Rule 1.150)

Any violation of this order or rule 1.150 is an unlawful interference with the proceedings of the court. The violation may result in an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions.

Comment: The use of this form is mandatory. A proposed order on Judicial Council Form MC-510 must be completed and filed along with any request for media coverage. Cal Rules of Ct 1.150(e)(1).

Change of Venue

I. OVERVIEW

A. Motion for Change of Venue §15.1

I. OVERVIEW

§15.1

A. Motion for Change of Venue

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move for an order transferring this case from this Court to a court in another county.

This motion will be based on the attached supporting memorandum, the attached declaration, __[the attached exhibit(s)]__, evidence taken at the hearing on this motion and argument at that hearing, and on all papers filed and records in this action.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page.

Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

Venue must be changed to another county on the defendant's motion when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be held in the county. Pen C §1033. Penal Code section 1033 is a codification of the standard of reasonableness laid down in *Maine v Superior Court* (1968) 68 C2d 375, 383. The court in *Maine* indicated that the determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. 68 C2d at 383.

The California Supreme Court has settled on five factors that the courts should take into account in deciding whether the reasonable likelihood standard has been met: (1) the nature and gravity of the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. *People v Davis* (2009) 46 C4th 539, 578; *People v Harris* (1981) 28 C3d 935, 948.

__ [Analyze each factor, showing how it tends to support a change of venue, and emphasizing those that most strongly support a change, with reference to such attachments as supporting declarations (e.g., by defendant's counsel, based on his or her review of relevant items) and exhibits (e.g., public opinion survey)] __.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

Comment: The most common reason for requesting a change of venue is pretrial publicity. In a high-publicity case, counsel should begin to assemble information pertinent to deciding whether to seek a change of venue from the time he or she first becomes involved with the case. Early steps include systematically documenting all media coverage. It is also important to obtain expert assistance as soon as possible. An expert can assist counsel in obtaining funding, design and administer a public opinion

survey to assess the impact of the publicity on community attitudes, help counsel assess whether a change of venue motion should be made, and testify at the evidentiary hearing.

The sample change of venue motion in this section is necessarily a skeletal version of a change of venue motion, because the five factors the court will consider in determining whether to grant the motion (see, *e.g.*, *People v Davis* (2009) 46 C4th 539, 578; *People v Staten* (2000) 24 C4th 434, 449) are highly dependent on the facts of each case.

Cross-Reference: Change of venue is discussed at length in Crim Law, chap 15.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1862. It is a very important document, as it contains the President's annual message to Congress. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States. It is a document that has been read and studied by many generations of Americans, and it is a document that has shaped the course of the nation's history. The letter is a masterpiece of American literature, and it is a document that is as relevant today as it was in 1862. It is a document that is a testament to the power of the written word, and it is a document that is a testament to the power of the American people.

16

Search and Seizure Motions

I. OVERVIEW

- A. Motion to Suppress Evidence Seized Without Warrant (Pen C §1538.5) **§16.1**
- B. Defense Motion to Quash Warrant and Suppress Evidence (Pen C §1538.5) **§16.2**
- C. Defense Motion to Controvert (Traverse) Search Warrant and to Suppress Evidence (Pen C §1538.5) **§16.3**
- D. Defense Memorandum in Support of Motion to Suppress Evidence Under Pen C §1538.5 **§16.4**
- E. Prosecution Opposition to Defense Pen C §1538.5 Motion **§16.5**
- F. Defense Motion for Information on Contents of Search Warrant Affidavit (*Luttenberger* Motion) **§16.6**
- G. Prosecution Request for Special Search and Seizure Hearing (Pen C §1538.5(j)) **§16.7**
- H. Motion for Return of Seized Property (Pen C §1536) **§16.8**

I. OVERVIEW

§16.1 A. Motion to Suppress Evidence Seized Without Warrant (Pen C §1538.5)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, at the time of the Penal Code section 1538.5 hearing now set for __[date]__, at __[time]__, defendant, __[name]__, will move to suppress evidence under Penal Code section 1538.5, seized by __[name of police department]__ from __[location]__ on __[date]__. *[That search is described in the police report attached as Exhibit A.]* __

The evidence that defendant seeks to suppress includes, but is not limited to, the following indicated items:

All physical (and intangible) evidence seized or obtained as a result of this search will be challenged based on search and seizure violations that occurred during:

[Check relevant items]

☐ **Defendant's detention.**

☐ **The search, pat-down, or frisk of defendant's person.**

☐ **Defendant's arrest.**

The physical (and intangible) evidence seized or obtained from this search occurred at the following place(s), including:

☐ **The residence, building, structure, or premises entered or invaded by the police in this cause.**

☐ **The box(es), package(s), or other containers opened or invaded by the police in this cause.**

☐ **The vehicle(s) entered or invaded by the police in this cause.**

This motion challenges all physical (and intangible) evidence seized or obtained as a result of the deprivation of the liberty or right to privacy of the following persons: __ *[List person or persons.]* __

This motion challenges the following physical (and intangible) evidence allegedly recovered as a result of the alleged violation: __ *[List particular evidence recovered.]* __

This motion also challenges all other evidence seized as a result of the alleged violation. __ *[Check if local rules permit.]* __

The complained of search and seizure violates defendant's Fourth Amendment rights under the United States Constitution.

More specifically, this motion is based on violation of defendant's reasonable expectation of privacy, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and on the following particular grounds:

[Check relevant items]

___ The defendant was unlawfully ___ [detained/frisked] ___ because the circumstances did not give to a reasonable suspicion that the defendant was ___ [armed/engaged in criminal activity] ___.

___ The ___ [search/seizure/arrest] ___ was without a warrant, and lacked probable cause.

___ The police action was without warrant and relied on hearsay information from other police sources; the defense therefore requests that said sources be produced in court (*People v Harvey* (1958) 156 CA2d 516; *People v Madden* (1970) 2 C3d 1017).

___ The arrest was in defendant's place of residence without a warrant and there was no showing of exigent circumstances.

___ The search or seizure was beyond the scope of consent and/or after consent was revoked.

___ [Add any other relevant grounds] ___

This motion will be based on the following evidence:

[Check relevant items]

___ Evidence to be presented at the hearing on this motion.

___ Supporting affidavits (attached to this motion).

___ Supporting declarations (attached to this motion).

___ Transcript of preliminary hearing ___ [in court file; the defendant hereby requests that the court take judicial notice of the contents of this transcript] ___.

___ Supporting memorandum (attached to this motion).

___ Supplemental supporting memorandum, to be filed after the hearing on this motion.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

The police actions on the date listed in the Notice of this Motion and/or any attached exhibits were accomplished without the aid of a warrant to search or arrest the defendant. For this reason, they are presumptively unreliable and must be justified by the prosecution. *People v Johnson* (2006) 38 C4th 717, 723; *People v Williams* (1999) 20 C4th 119, 136.

The defense contends that the actions of the police officers in this case were unreasonable and no exception to the warrant requirement applies. Further, the defendant contends that all of the evidence alleged to have been seized, as enumerated in the Notice of this Motion, represents the fruits of this unlawful seizure and must therefore be suppressed.

The defense submits the following additional authorities in support of these arguments:

Fourth Amendment, United States Constitution.

Penal Code section 1538.5.

Payton v New York (1980) 445 US 573, 576, 100 S Ct 1371 (absent exigent circumstances, warrantless searches and seizures of persons in their homes to make routine felony arrests are prohibited).

U.S. v Watson (1976) 423 US 411, 417, 96 S Ct 820 (officer must possess reasonable belief that there was reasonable cause for warrantless arrest).

U.S. v Place (1983) 462 US 696, 700, 103 S Ct 2637 (absent exigent circumstances, seizure of personal property is per se unreasonable in absence of judicial warrant from neutral magistrate based on probable cause and describing items with particularity).

Defendant requests leave to file an additional supporting memorandum after the hearing on the motion, because evidence may be adduced at the hearing that will require further briefing by the parties.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for _____[name of
defendant]_____

Comment: This motion is used if there was no warrant. The notice of motion portion may be submitted as a checklist, as it appears in this form, or the relevant items may be described in complete sentences.

Local rules. Be sure to check local rules for any special requirements; they are common concerning Pen C §1538.5 motions, particularly in felony cases.

Notice. Notice is required for Pen C §1538.5 hearings held in misdemeanor cases; any local rules requiring written notice must be followed. See *People v Lewis* (1977) 71 CA3d 817. Written notice must be served on the prosecutor at least 10 court days before a 1538.5 hearing is held after the information or indictment is filed in a felony case, unless the prosecutor waives a portion of this time, Pen C §1538.5(i). At least 5 court days' written notice is required for 1538.5 motions made at the preliminary hearing, Pen C §1538.5(f).

Content of motion. *The evidence that defense counsel seeks to suppress must be specified in detail.* See *People v Manning* (1973) 33 CA3d 586. However, because only what is specified may be suppressed, defense counsel should add a more general phrase if permitted by local rules (see, e.g., Orange Super Ct R 800(E)(1)(b), which does not permit such a phrase), such as "and all other evidence seized as a result of the alleged violation." Because local rules vary, this phrase is included to be optionally checked in the motion form above. Counsel may include the phrase or substitute another phrase tailored to local rules.

When making a Pen C §1538.5 motion challenging a warrantless search, the defense must first assert the absence of a warrant and make a sufficient *prima facie* showing to support that assertion. The prosecution then has the burden of producing evidence that the warrantless search or seizure was reasonable. *People v Williams* (1999) 20 C4th 119, 130. However, if the defendant plans to make any argument asserting the unreasonableness of the search aside from the absence of a warrant, such as a violation of the knock-notice requirement argument, the defendant must specify that additional argument as part of the motion to suppress so that the prosecution has the opportunity to respond. *People v Williams* (1999) 20 C4th 119, 130; *People v Oldham* (2000) 81 CA4th 1, 13.

The defense motion should provide enough information that the district attorney knows what witnesses to subpoena. Check local practice; in some counties, it is also common to call a deputy district attorney well before the hearing and tell him or her which witnesses to subpoena to the hearing. If the defense decides to postpone or cancel the hearing, the district attorney should be given sufficient notice to be able to notify witnesses so they do not have to miss work unnecessarily.

Because the burden of proof is on the prosecution, only *after* the prosecution has offered its justification for the warrantless search, either in a written response before the hearing, or at the time of the hearing, does the defense need to answer with its arguments why the justification is inadequate. *People v Williams* (1999) 20 C4th 119. See also Crim Law §16.8.

If the defense needs witnesses for the 1538.5 hearing, *e.g.*, on the issue whether the defendant had a reasonable expectation of privacy, be sure to subpoena them in sufficient time to appear.

Time for motion. To obtain pretrial review of denial of a Pen C §1538.5 motion, the motion must have been “made” no later than 45 calendar days after arraignment in misdemeanor cases, and no more than 60 calendar days after arraignment on the information or indictment in felony cases. Pen C §1510. A motion is made when the motion is filed. CCP §1005.5. Reserving or noticing the motion is not enough. *Smith v Superior Court* (1978) 76 CA3d 731. Therefore, title the written motion either “notice of motion and motion” or “motion.”

Reasonable expectation of privacy. The defense bears the burden of proving that the defendant had a reasonable expectation of privacy in the place searched or the items seized. See *Rakas v Illinois* (1978) 439 US 128, 99 S Ct 421; Crim Law §16.19. The trial court is not obligated to require the defense to show a reasonable expectation of privacy before the prosecution demonstrates the reasonableness of the warrantless search;

however, the court *may* do so, as the order of proof is within the trial court's discretion. *People v Contreras* (1989) 210 CA3d 450, 456.

NOTE► Some California cases still use the word “standing” when referring to the defendant's right to challenge a search or seizure on Fourth Amendment grounds. See *People v Ayala* (2000) 23 C4th 225, 254 n3.

Opposing suppression motion. Possible technical objections to a defense motion to suppress the fruits of a warrantless search or seizure include the following:

- No accompanying memorandum (see Cal Rules of Ct 4.111).
- The motion does not comply with the requirements of Pen C §1538.5 or local rule requirements.
- At the preliminary hearing, only evidence presented by the People can be suppressed (Pen C §1538.5(f)).
- The defense cannot suppress evidence it failed to specify as subject to its suppression motion.
- The defendant has not shown a reasonable expectation of privacy (*In re Lance W.* (1985) 37 C3d 873, 879). For example, a defendant had no reasonable expectation of privacy in a vehicle's sensing diagnostic module's recorded data because she was driving on a public roadway and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras. *People v Diaz* (2013) 213 CA4th 743, 754.

Cross-Reference: For discussion of search and seizure motions, see Crim Law, chap 16; on search and seizure generally, see California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.2

B. Defense Motion to Quash Warrant and Suppress Evidence (Pen C §1538.5)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court quash search warrant __[number]__, and suppress as evidence and restore to the defendant all property seized under or during the execution of those warrants.

The motion will be made on the following grounds:

[Check relevant grounds]

___ **The search warrant was issued without probable cause and the good faith exception to the exclusionary rule is inapplicable because** __[a reasonable and well-trained officer would have known that the affidavit failed to establish probable cause, would not have acted with reckless disregard for the truth, would not have ignored that the magistrate had abandoned his or her judicial neutrality, and would not have applied for a warrant / the warrant was so facially deficient that a reasonable officer could not have had a good faith belief in its sufficiency / the warrant was based on information the officer knew or should have known was false]__.

___ **Because the magistrate wholly abandoned** __[his/her]__ **judicial rule, the search warrant was not issued by a neutral and detached magistrate.**

___ **The search exceeded the authority of the search warrant.**

___ **The** __[place to be searched/property to be seized]__ **was not described with sufficient particularity in the search warrant.**

___ **The search warrant is the product of a prior unlawful search and seizure conducted under search warrant** __[number]__.

___ __[List other relevant grounds.]__

[Continue]

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, __[the attached declaration(s), __[the attached exhibit(s),]__ a supplemental supporting memorandum to be filed after the hearing on this motion]__, evidence taken at this hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

_____[Signature of attorney]_____

_____[Typed name]_____

_____[Title if in public defender
office]_____Attorney for _____[name of
defendant]_____

[The supporting memorandum should start on a new page.

Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]

SUPPORTING MEMORANDUM

[Select relevant arguments, add additional authority, and
apply each argument to the facts of your case. Add any
additional arguments that apply to your case.]

DEFENDANT HAS THE RIGHT TO MOVE TO QUASH THIS WARRANT

A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that the search or seizure with a warrant was unreasonable because _____[state the ground that applies to the facts of your case, e.g.: the warrant lacked probable cause and the good faith exception to the exclusionary rule does not apply; the warrant is insufficient on its face; the property or evidence obtained is not that described in the warrant; Pen C §1538.5(a)(1)]_____.

THE AFFIDAVIT IS SO LACKING IN INDICIA OF PROBABLE CAUSE THAT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY

The affidavit in support of the search warrant in this case fails to establish probable cause for its issuance, and a reasonably well-trained officer would have known that the affidavit was insufficient and would not have applied for a warrant. *U.S. v Leon* (1984) 468 US 897, 104 S Ct 3405; *People v Camarella* (1991) 54 C3d 592, 602.

_____[Discuss the facts of your case and relate them to relevant cases; see search and seizure resources in the cross-reference at the end of this motion.]_____

THE SEARCH WARRANT IS A GENERAL WARRANT, AND THEREFORE ILLEGAL

The search warrant in this case is a general warrant, permitting exploratory searches, insofar as it purports to authorize the seizure of __[*state type of evidence seized, e.g., business records*]__ that are not specifically described, in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution. The search warrant fails to establish probable cause to believe that any particular __[*e.g., business records*]__ are present at the premises to be searched.

__[*Add discussion of facts of case and relevant case law; see, e.g., Stanford v Texas (1965) 379 US 476, 85 S Ct 506; Griffin v Superior Court (1972) 26 CA3d 672, 695; Aday v Municipal Court (1962) 210 CA2d 229.*]__

DEFENDANT ASKS PERMISSION TO FILE SUPPLEMENTAL SUPPORTING MEMORANDUM AFTER THE HEARING ON THIS MOTION

Defendant requests permission to file a supplemental supporting memorandum after the hearing on this motion, to address the testimony at that hearing, and the prosecution's arguments.

CONCLUSION

For all of the foregoing reasons, this motion should be granted, the search warrant quashed, and all evidence seized under the authority of that warrant suppressed.

Date: _____

Respectfully submitted,

__[*Signature of attorney*]__

__[*Typed name*]__

__[*Title if in public defender office*]__

Attorney for __[*name of defendant*]__

Comment: This motion is used to challenge the lawfulness of a warrant and to suppress evidence obtained with the warrant, when the alleged deficiency in the warrant is apparent on its face. When the ground for suppression of the evidence obtained with a search warrant is not apparent on the face of the warrant (for example, when the allegation is that the showing of probable cause in the affidavit in support of the warrant was based on false

or unreliable information), the defense should file a motion to “controvert” or “traverse” the warrant. See §16.3 for a sample motion to controvert the warrant.

One major difference between a motion based on a warrant and the motion in §16.1, which is based on a warrantless search, is that the defendant has the burden of presenting evidence when a warrant was used. The defendant must subpoena witnesses to the hearing on the motion to establish the truth of the allegations in the motion.

Cross-Reference: For discussion of search and seizure motions, see Crim Law, chap 16; California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.3 C. Defense Motion to Controvert (Traverse) Search Warrant and to Suppress Evidence (Pen C §1538.5)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on __[date]__, at __[time]__, in Department No. __[number]__ of the above-entitled Court, the time and place set for the motion to suppress pursuant to Penal Code section 1538.5, the defense will move to controvert and to quash Warrant No. __[number]__ on the following __[ground/grounds]__:

[Check relevant grounds]

___ The affidavit for the search warrant does not constitute probable cause for its issuance.

___ The warrant is defective in that it does not specify the things to be seized or the persons to be searched, or does not specify with particularity the place to be searched.

___ The warrant was not timely or properly served (see Penal Code sections 840, 841, 842, 1531).

___ The affidavit supporting the warrant in this cause was made defective by __[the omission of material facts/the inclusion of erroneous information]__ described in the attached supporting memorandum;

___ The search was unreasonable or excessive in its scope.

___ _ [Add other relevant grounds.] _ _

[Continue]

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, _ _ [the attached declaration(s), _ _ [the attached exhibit(s)], _ _ a supplemental supporting memorandum to be filed after the hearing on this motion] _ _ , evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] _ _

__ [Title if in public defender
office] _ _

Attorney for _ _ [name of
defendant] _ _

[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

__ _ [Summarize your argument in two to three sentences.] _ _

STATEMENT OF FACTS

__ _ [Give the relevant facts concerning the search and seizure. Be brief.
Support the facts with references to facts sworn to in declarations and
documents attached to the motion as exhibits, e.g., the warrant.] _ _

ARGUMENT

__ _ [State individual arguments here. See the arguments in the Com-
ment to this motion, and in the supporting memorandum in §16.4. Your
argument should convincingly demonstrate that misstatements or omis-
sions in the affidavit are material and that when they are disregarded,
there is no probable cause. See, e.g., US Const, amend IV; Pen C §1538.5;

Illinois v Gates (1983) 462 US 213, 103 S Ct 2317; *Franks v Delaware* (1978) 438 US 154, 155, 98 S Ct 2674; *People v Box* (1993) 14 CA4th 177, 183; and cases in the resources listed in the Cross-Reference at the end of this motion.]__

[Optional]

OFFER OF PROOF RE WARRANT CONTROVERSION

__[Name of police officer]__ of the __[name of police department]__ will testify to the fact that __[summarize anticipated testimony and attach any written documentation of that testimony as an exhibit]__.

[Optional]

DEFENDANT ASKS PERMISSION TO FILE SUPPLEMENTAL SUPPORTING MEMORANDUM AFTER THE HEARING ON THIS MOTION

Defendant requests permission to file a supplemental supporting memorandum after the hearing on this motion, to address the testimony at that hearing and the prosecution's arguments.

CONCLUSION

For the above reasons, the defense requests that this Court find the statements discussed above to be deliberately false, or made in reckless disregard of the truth, to find that what remains in the affidavit after excising the false statements is insufficient to support a finding of probable cause, and that the court quash Warrant No. __[number]__, and suppress all evidence seized under the authority of that warrant.

Date: ____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

Comment: To controvert or traverse (the two words are used interchangeably) a warrant means to challenge the factual showing on which it was issued. Defense counsel must set forth, "with some specificity, reasons for contending that the affidavit is inaccurate," before a hearing is required. *Theodor v Superior Court* (1972) 8 C3d 77, 103; *People v Cooks* (1983) 141 CA3d 224, 295.

This is a factual showing. The defendant bears the burden of establishing as a matter of fact that (1) the affidavit contains material misstatements of fact or that material facts were omitted from it; (2) the affiant was deliberately false or acted in reckless disregard of the truth; *and* (3) what remains in the affidavit after excising the false statements or adding the omitted information is insufficient to support a finding of probable cause. *Franks v Delaware* (1978) 438 US 154, 155, 98 S Ct 2674.

To obtain a hearing on the motion, counsel must accompany the motion with documentary evidence and sworn statements that, if uncontroverted, establish all three of these premises. 438 US at 171. See also *People v Box* (1993) 14 CA4th 177, 183. At a *Franks* hearing, the defense bears the burden of proof and must subpoena witnesses to the hearing. A hearing is not required on this motion unless the defense provides specific reasons in its notice of reasons for contending that the affidavit is inaccurate. *Theodor v Superior Court* (1972) 8 C3d 77. If the court agrees to hold a hearing, the court is required not only to find that statements in the affidavit are deliberately false, or false and made in reckless disregard of the truth, but must also find that after deleting these false statements, there is insufficient probable cause to support the warrant. *People v Luttenberger* (1990) 50 C3d 1.

Before making this motion to traverse, the defense may need to make a motion to discover information with which to controvert the warrant, commonly called a *Luttenberger* motion. See Crim Law §16.11.

Cross-Reference: For further discussion of controverting the warrant, see Crim Law §16.10; California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.4 D. Defense Memorandum in Support of Motion to Suppress Evidence Under Pen C §1538.5

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

SUMMARY OF ARGUMENT

__ *[Summarize your arguments in two to three sentences.]* __

STATEMENT OF FACTS

__ [Summarize the facts at the §1538.5 hearing. Cite to line and page number of the reporter's transcript, if one is available, and attach it to the motion as an exhibit.] __

ARGUMENT

[The following are sample arguments for some of the more common search and seizure issues. Use those that are relevant, add cases on point to your case (good resources for search and seizure cases are given in the Cross-Reference at the end of this motion), and argue them in relation to the facts as they came out at the hearing. Add any additional arguments that apply to your case.]

THE DEFENDANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE __ [PLACE SEARCHED/ITEMS SEIZED] __

A defendant may challenge the propriety of a search or seizure that violates the defendant's own reasonable expectations of privacy in the area searched or the item seized. (*Rakas v Illinois* (1978) 439 US 128, 99 S Ct 421. See also *Mancusi v DeForte* (1968) 392 US 364, 88 S Ct 2120.)

Mancusi involved the search of offices shared by several union officials, one of them named DeForte. The Court found the following facts:

[T]he office where DeForte worked consisted of one large room, which he shared with several other union officials. The record does not show from what part of the office the records were taken, and DeForte does not claim that it was a part reserved for his exclusive personal use. The parties have stipulated that DeForte spent "a considerable amount of time" in the office, and that he had custody of the papers at the moment of their seizure. (392 US at 368.)

The Court found that DeForte had standing and that "the situation was not fundamentally changed because DeForte shared an office":

DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched.... *This expectation was inevitably defeated by the entrance of state officials....* (392 US at 369; emphasis added.)

In *Mancusi*, the court held that the right to claim Fourth Amendment protection depends “not upon a property interest in the invaded place but upon whether the area was one in which there was a reasonable expectation of *freedom from governmental intrusion*.” (392 US at 368; emphasis added.) The *Mancusi* court referred to *Jones v U.S.* (1960) 362 US 257, 80 S Ct 725, overruled on other grounds in *U.S. v Savucci* (1980) 448 US 83, 85, 100 S Ct 2547, and emphasized that “like DeForte, Jones had little expectation of absolute privacy, since the owner and those authorized by him were free to enter,” but “we think that our decision that Jones had standing clearly points to the result which we reach here.” (392 US at 370.)

In *Jones v U.S.*, *supra*, the police searched the premises of another person and found narcotics. Jones was present in the house at the time of the search and later testified that the place belonged to a friend who had given him the key and access to the apartment. The Court held that Jones had standing to contest the search.

Jones is still good law to the extent that it stands for the

proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from *unreasonable governmental intrusion into that place*. (*Rakas v Illinois* (1978) 439 US 128, 142, 99 S Ct 421; emphasis added. See *Rawlings v Kentucky* (1980) 448 US 98, 104, 100 S Ct 2556.)

A DEFENDANT MAY DENY OWNERSHIP OF CONTRABAND BUT STILL ASSERT A REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED

A defendant's disclaimer of ownership is not necessarily inconsistent with a claim that the area invaded by the police officers during their search was one in which the defendant possessed a reasonable expectation of privacy, and the law "does not permit the government to argue possession but deny expectation of privacy where the circumstances of the case make such positions necessarily inconsistent." (*U.S. v Issacs* (1983) 708 F2d 1365, 1368.)

In *Issacs*, the police seized journals kept in Issacs' safe. The Ninth Circuit held that Issacs could simultaneously argue that the journals did not belong to him and that the search violated his reasonable expectation of privacy in the contents of his safe.

Neither ownership of premises nor presence at scene are required to assert standing in searched premises if there is a "formalized arrangement ... indicating joint control and supervision." (*U.S. v Johns* (9th Cir 1988) 851 F2d 1131, 1136.) The possessory interest must exist at the time of the search. (See also *U.S. v Perez* (9th Cir 1982) 689 F2d 1336 (defendants had standing in truck not owned by them, but which they were closely following and supervising as it transported heroin).)

THE DEFENDANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED

[Describe the facts of defendant's case—specifically, the area that was searched—and explain why there was an expectation of privacy; an example follows.]

Evidence was presented that the defendant was driving the automobile with the owner's permission and possessed keys to the ignition and the camper shell. This same type of evidence was sufficient to confer standing to challenge the search of a truck and camper shell in *People v Carvajal* (1988) 202 CA3d 487.

THE BURDEN OF JUSTIFYING A WARRANTLESS SEARCH OR SEIZURE IS ON THE PROSECUTOR

The burden of justifying a warrantless search, seizure, arrest, or detention falls on the prosecution. (*Badillo v Superior Court* (1956) 46 C2d 269; *Wilder v Superior Court* (1979) 92 CA3d 90, 294. See also *People v Williams* (1988) 45 C3d 1268, modified on other grounds by *People v Guivan* (1998) 18 C4th 558, 560.)

The defendant's only burden is to show, by competent evidence presented or stipulation entered into at the hearing, that the search or seizure occurred without a search or arrest warrant.

Once the defendant has shown this, it is the People's burden to offer evidence and authorities to justify dispensing with a warrant. *People v Williams* (1999) 20 C4th 119.

THERE WAS NO LEGAL JUSTIFICATION TO DETAIN THE DEFENDANT

A police officer may only detain a citizen if the police officer possesses

specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. [This suspicion] ... must be *objectively reasonable* for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience ... to suspect the same criminal activity and the same involvement by the person in question.[] The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor or hunch is unlawful, even though the officer may be acting in complete good faith. (*In re Tony C.* (1978) 21 C3d 888, 893 (emphasis added); see *Graham v Connor* (1989) 490 US 386, 397, 109 S Ct 1865.) (Some language has been deleted from the quotation because reasonable suspicion is no longer measured by a particular officer's subjective state of mind at time of stop or detention.)

THE FACT THAT THE INCIDENT OCCURRED IN A "HIGH CRIME AREA" DOES NOT SUPPORT THE ACTION TAKEN BY THE POLICE

People v Bower (1979) 24 C3d 638, holds that

[t]he "high crime area" factor is *not* an "activity" of an individual. Many citizens of this state are forced to live in areas that have "high crime" rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. As a result, this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circum-

stances into circumstances justifying the seizure of an individual. (Citations omitted.) (24 C3d at 645; emphasis added.)

Accord, *People v Loewen* (1983) 35 C3d 117, 124; *People v Huntsman* (1984) 152 CA3d 1073.

EVIDENCE OF PREVIOUS ARRESTS IN THE SAME AREA, WITHOUT ADDITIONAL EVIDENCE OF THE PROPRIETY OF SUCH ARRESTS OR EVIDENCE OF CONVICTIONS RESULTING THEREFROM, DOES NOT JUSTIFY DETENTION, SEARCH, OR ARREST

In *People v Bower* (1979) 24 C3d 638, 646, the court stated:

[T]his court has warned of the “dangers” of using an officer’s experience as to prior arrests to conclude that a location’s crime rate is high. (Citation omitted.) Where there is no indication that those arrests were themselves proper or that they resulted in convictions of the persons arrested, it is impossible to use them as an accurate assessment of crime rate for the purpose of evaluating the validity of a later intrusion upon an individual’s security.

Accord, *Remers v Superior Court* (1970) 2 C3d 659, 668; *Cunha v Superior Court* (1970) 2 C3d 352, 357.

AVOIDING THE POLICE DOES NOT FURNISH GROUNDS TO DETAIN OR ARREST DEFENDANT

In *Bower*, the court noted:

In our society, private individuals are free to conduct their own lives, seeking to mingle with or to avoid whomever they please. They certainly are under no legal duty to submit to the attentions of another private person. Unlike a private party, however, a police officer does have the power to insist upon an encounter—that is, an officer has the power to “detain”—but only when he or she has adequate cause. Lacking such a basis, an officer may not detain an individual, and the individual, unless he or she is properly detained and so notified, is as free to avoid the officer as to avoid any other person. *To hold that the mere exercise of this liberty justifies a detention would be tantamount to holding that an officer may insist upon an encounter without adequate cause.* (24 C3d at 648; emphasis added.)

Accord, *People v Aldridge* (1984) 35 C3d 473, 479.

THERE WAS NO PROBABLE CAUSE TO ARREST DEFENDANT

An officer may arrest a person without a warrant whenever probable cause exists to believe (a) the person has committed a felony (Penal Code Section 836) or (b) a misdemeanor has been committed in the officer's presence. (Penal Code Section 836; *In re Thierry S.* (1977) 19 C3d 727.)

This reasonable cause is shown if a person of ordinary care and prudence would be led to "believe and conscientiously entertain an honest and strong suspicion" that the accused is guilty. (*People v Ingle* (1960) 53 C2d 407, 412; *People v Knight* (2004) 121 CA4th 1568, 1573.)

An arrest takes place "when a person is restricted in his or her liberty of movement." (*Call v U.S.* (9th Cir 1969) 417 F2d 462.)

Although there is no fixed test to determine exactly when an arrest has taken place, several cases have held that certain actions raise the presumption of arrest. (See, e.g., *Florida v Royer* (1983) 460 US 491, 103 S Ct 1319 (if officer testifies he or she would not have let defendant go or if defendant's property is taken from him or her and kept by police); *U.S. v Marin* (2d Cir 1982) 669 F2d 73; *U.S. v Strickler* (9th Cir 1974) 490 F2d 378 (show of weapons).)

A WARRANTLESS ARREST WITHIN A HOME IS UNREASONABLE WITHOUT A SHOWING OF EXIGENT CIRCUMSTANCES

A warrantless arrest in a home is per se unreasonable, unless the prosecution can prove both probable cause (*U.S. v Howard* (9th Cir 1987) 828 F2d 552) and exigent circumstances excusing the police from obtaining a warrant (*U.S. v Rubin* (3d Cir 1973) 474 F2d 262; *People v Ramey* (1976) 16 C3d 263; see *Payton v New York* (1980) 445 US 573, 100 S Ct 1371).

The exigency must be provided by an imminent or substantial threat to life, health or property. (*Horack v Superior Court* (1970) 3 C3d 720.)

The structure does not have to be the arrestee's own home; it can be any place in which the occupant has acquired a "legitimate expectation of privacy." (*People v Willis* (1980) 104 CA3d 433, disapproved on other grounds in *People v Davis* (2009) 46 C4th 539, 594 n4).

Entry into a residence without a search warrant to look for a third party for whom the police had an arrest warrant is illegal. (*Steagald v U.S.* (1981) 451 US 204, 101 S Ct 1642.)

THE OFFICER'S OBSERVATIONS DID NOT PROVIDE PROBABLE CAUSE TO ARREST DEFENDANT

The validity of an arrest depends on whether the "facts and circumstances within (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." (*Beck v Ohio* (1964) 379 US 89, 91, 85 S Ct 223.) Subjective good faith alone is not enough. (*Beck v Ohio, supra.*)

In some cases, a particularly experienced officer can arrest based on observations that are meaningful only to him or her due to his or her expertise. Conversely, when an officer does not possess such expertise, the arrest would not be justified. (*Cunha v Superior Court* (1970) 2 C3d 352; *People v Knisely* (1976) 64 CA3d 110; *Remers v Superior Court* (1970) 2 C3d 659; cf. *Texas v Brown* (1983) 460 US 730, 103 S Ct 1535 (officer was experienced).)

Additionally, if the objects seen are not necessarily contraband, an arrest will not be justified. (*Thomas v Superior Court* (1972) 22 CA3d 972 (hand-rolled cigarette not contraband on its face); *Cunha v Superior Court, supra* (unknown substance); *Remers v Superior Court, supra* (tin-foil package).)

THE FRUITS OF AN ILLEGAL ACT ARE TAINTED AND CANNOT BE USED AS EVIDENCE

Evidence seized as the result of a search or seizure (or an arrest) that has exceeded permissible bounds is the "fruit of the poisonous tree" and must be excluded. (*Wong Sun v U.S.* (1963) 371 US 471, 83 S Ct 407.)

Thus confessions, admissions and physical evidence may be barred (*Lockridge v Superior Court* (1970) 3 C3d 166), as may be testimony as to the identity of stolen goods (*People v Dowdy* (1975) 50 CA3d 180) and tape recordings (*People v Coyle* (1969) 2 CA3d 60). (See also *Ruiz v Craven* (9th Cir 1970) 425 F2d 235 (confession after confrontation with illegally seized heroin).)

Tangible evidence obtained as the fruit of a *Miranda* violation is inadmissible and may be suppressed under Penal Code section 1538.5 if it is the fruit of an error that may be challenged under section 1538.5. (*People v Abbott* (1970) 3 CA3d 966; *U.S. v Cassell* (7th Cir 1971) 452 F2d 533; *People v Superior Court (Keithley)* (1975) 13 C3d 406.) An admission or confession or other intangible fruit that is the result of an illegal arrest can be challenged under section 1538.5. (*Wong Sun v U.S.* (1963) 371 US 471, 83 S Ct 407; *People v DeVaughn* (1977) 18 C3d 889.)

Once it is shown that a statement was the fruit of a violation of the constitutional proscription against unreasonable searches and seizures, it is the People's burden to try to purge the evidence of its taint. A mere giving of the *Miranda* admonition is not enough. (*Brown v Illinois* (1975) 422 US 590, 95 S Ct 2254.)

THE PROSECUTION MUST PROVIDE THE SOURCE OF INFORMATION TRANSMITTED THROUGH OFFICIAL CHANNELS WHEN CHALLENGED

It is the prosecution's burden, on defense request, to show that information received by an officer through official channels had a legitimate source. Therefore, when challenged by the defense, the prosecution must produce either the original informant (the source of the information relied on) or the officer who received the information from the informant. (*People v Madden* (1970) 2 C3d 1017; *People v Harvey* (1958) 156 CA2d 516; *People v Lara* (1967) 67 C2d 365; *People v Adkins* (1969) 273 CA2d 196; see also *Whiteley v Warden* (1971) 401 US 560, 91 S Ct 1031; 2 LaFave, Search and Seizure §3.5.)

This rule applies at hearings on motions to suppress evidence under Penal Code Section 1538.5. (*Ojeda v Superior Court* (1970) 12 CA3d 909.)

This rule applies to detentions as well: The prosecution must produce either the informant or the initiating officer when challenged. (*People v Collin* (1973) 35 CA3d 416, superseded on other grounds by *People v Castaneda* (1995) 35 CA4th 1222, 1229.)

INFORMATION FROM A KNOWN BUT UNTESTED INFORMANT DOES NOT FURNISH PROBABLE CAUSE TO ARREST

Information provided by a known but untested informant justifies further investigation by police but does not furnish probable cause for an arrest (*People v Fein* (1971) 4 C3d 747) unless corroborated by other facts or circumstances. (*People v Lara* (1967) 67 C2d 365.) This corroboration must pertain to defendant's criminal activity. (*People v Fein, supra*.) The burden of providing this corroborative evidence falls on the prosecution. While information provided by a "citizen-informant" does give the police probable cause to arrest, the prosecution bears the burden of proving that the informant is a citizen-informant. (*People v Herdan* (1974) 42 CA3d 300.) The information still requires a basis of credibility and some corroboration of the alleged criminal act. (*People v Zimnicki* (1972) 29 CA3d 577.)

Illinois v Gates (1983) 462 US 213, 103 S Ct 2317, may have eliminated the *Aguilar/Spinelli* test of probable cause (*Aguilar v Texas* (1964) 378 US 108, 84 S Ct 1509; *Spinelli v U.S.* (1969) 393 US 410, 89 S Ct 584) and substituted a "totality of the circumstances" test that permits the issuance of a warrant based on a partially corroborated anonymous informant's tip, but it is distinguishable. In *Gates*, the tipster had described the defendants' modus operandi in some detail. Police surveillance, although not disclosing criminal activity, corroborated the actions. Five justices held that the magistrate's determination of probable cause was justified.

Its rule applies to searches conducted *pursuant to warrant*: and the high court has not suggested it should be extended to warrantless searches. The decision reiterates the comment in *Spinelli* that "a magistrate's determination of probable cause should be paid great deference by reviewing courts" (393 US at 419). This is a totally different situation from that presented by a warrantless search, where no independent judicial determination by a "neutral and detached magistrate" has been made. (See generally *U.S. v Ventresca* (1965) 380 US 102, 85 S Ct 741; 2 LaFave, Search and Seizure §4.1.)

Gates should be read with care by California trial courts, and not be extended further than its holding. (See Abramovsky, *Illinois v Gates: A New Standard for Evaluating Probable Cause*, Search and Seizure Law Report, Vol. 10, No. 7 (Aug. 1983).)

BEFORE THE PAT SEARCH OF A DEFENDANT MAY BE FOUND PROPER, THE PROSECUTOR MUST SHOW THAT THE POLICE HAD A REASONABLE BELIEF THAT THE DEFENDANT WAS ARMED AND DANGEROUS

If an officer does not have grounds to detain, he or she does not have grounds to frisk. (*Terry v Ohio* (1968) 392 US 1, 88 S Ct 1868.) If an officer does not have sufficient cause to make a *Terry* stop, he or she may not frisk the person even if he or she suspects the person is armed. (*Terry v Ohio*, *supra*.)

Justice Harlan's concurrence in *Terry* squarely addresses the question:

[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist upon an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. *I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.* (392 US at 33; emphasis added.)

CONCLUSION

For all the reasons given above, and because the prosecution has not borne its burden in the instant case, the motion to suppress should be granted, __[the warrant quashed]__, and the evidence seized by the police in this case should be suppressed.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__

Attorney for __[name of
defendant]__

Comment: This memorandum primarily concerns issues involved in warrantless searches and arrests. It summarizes major principles and cites some of the leading cases, and may be useful as a starting point in drafting a memorandum in a particular case. Determining whether a particular police intrusion violates the Fourth Amendment is, however, necessarily a

fact-specific enterprise, and the generic arguments outlined here must be refined and tailored to the facts of the individual case to be effective.

In some counties, it may be possible to file a skeletal memorandum along with the motion and obtain permission from the court to file a more detailed argument after the evidence has been presented. This approach avoids tipping your hand to the prosecutor and perhaps giving him or her an opportunity to shore up weak points in the evidence that might otherwise have gone unnoticed. However, this approach risks losing the motion altogether if it is heard by a judge who is inclined to rule on the motion right away.

Cross-Reference: For discussion of search and seizure motions, see California Criminal Law Procedure and Practice, chap 16 (Cal CEB); California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.5 E. Prosecution Opposition to Defense Pen C §1538.5 Motion

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

OPPOSITION MEMORANDUM

SUMMARY OF ARGUMENT

__[Summarize your arguments in two to three sentences.]__

SUMMARY OF FACTS

__[Briefly describe the relevant facts. If a reporter's transcript of the hearing is available, attach it to your opposition as an exhibit and refer to it here by page and line.]__

ARGUMENT

[Use those arguments below that fit your case, and any additional ones needed.]

DEFENDANT HAS NOT SHOWN THAT __[HE/SHE]__ HAD A REASONABLE EXPECTATION OF PRIVACY IN THE __[PLACE SEARCHED/ITEMS SEIZED]__

__ [See cases on reasonable expectation of privacy in California Criminal Law Procedure and Practice §16.3 (Cal CEB).] __

[Use the following if defendant seeks to controvert the warrant.]

DEFENDANT HAS NOT MADE A SUFFICIENT SHOWING TO REQUIRE THE COURT TO ALLOW THE DEFENSE TO CONTROVERT THE WARRANT

__ [Argue why there is not a sufficient showing, e.g., the reasons are not given with specificity (*Theodor v Superior Court* (1972) 8 C3d 77, 103), or the defendant did not make a substantial preliminary showing, e.g., through declarations, that the affiant made statements that were deliberately false or in reckless disregard of the truth and that what remains in the affidavit after excising the false statements is insufficient to support a finding of probable cause (*Franks v Delaware* (1978) 438 US 154, 155, 98 S Ct 2674; *People v Box* (1993) 14 CA4th 177).] __

[If defendant seeks only to quash the warrant (not controvert it, also), the specific issues raised by the defense should be addressed; general points that you also may wish to make follow.]

___ A search warrant and the affidavit underlying that warrant are presumed to be valid. (*People v Luttenberger* (1990) 50 C3d 1.)

___ The defense did not present prima facie evidence of an illegal arrest or illegal search and seizure. (*Badillo v Superior Court* (1956) 46 C2d 269; *People v Carson* (1970) 4 CA3d 782.) If the moving party does not meet this burden, the motion to suppress should be denied. (4 CA3d at 786.)

___ The defense did not move the warrant into evidence, so there is no evidence on which to base a ruling. (*People v Wohlleben* (1968) 261 CA2d 461.)

___ Even if the warrant is invalid, the evidence is admissible if the officer serving the warrant acted in good faith reliance on the warrant's validity. (*U.S. v Leon* (1984) 468 US 897, 104 S Ct 3405; *People v Camarella* (1991) 54 C3d 592.) The government has the burden of establishing "objectively reasonable" reliance. (468 US at 924.)

[If there was no warrant, the specific issues raised by the defense should be addressed.]

CONCLUSION

The People request that this Court deny the defense Penal Code section 1538.5 motion to suppress evidence for the reasons stated above.

Date: _____

Respectfully submitted,

_____[Name of District Attorney]____

District Attorney

_____[Signature of deputy district attorney]____

_____[Typed name]____

Deputy District Attorney

Comment: The prosecution must file and serve any response to a Pen C §1538.5 motion that is to be heard at the preliminary hearing at least two court days before the hearing. Pen C §1538.5(f)(3). It is common for special deadlines to be set either by local rule or by practice concerning Pen C §1538.5 motions. Local rules in some jurisdictions require a written response from the prosecution to defense counsel's written motion. See Orange Super Ct R 800(E)(2). The prosecution should advance in the opposition whatever theories it wants to preserve for appellate review, because new theories cannot be advanced for the first time on appeal (*Mestas v Superior Court* (1972) 7 C3d 537; *People v Miller* (1972) 7 C3d 219) unless the factual record is sufficient to decide the theory as a matter of law (see *Green v Superior Court* (1985) 40 C3d 126).

When the defense raises a new issue or ground (oral or written) within the hearing or at argument following the evidentiary hearing itself, the prosecution should consider whether to ask the court to allow it to reopen in order to meet the issue.

Cross-Reference: For further discussion of search and seizure, see Crim Law, chap 16; California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.6

F. Defense Motion for Information on Contents of Search Warrant Affidavit (Luttenberger Motion)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order the prosecution to make available to the defense the following information: __[Describe information desired]__. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

__[Summarize your argument in two to three sentences.]__

SUMMARY OF FACTS

__[Briefly summarize the facts relevant to this motion.]__

ARGUMENT

[Detail under separate subheads the information that leads you to believe that there are material misstatements and/or omissions in the search warrant affidavit. Cite relevant legal authority, e.g., US Const amend IV; Pen C §1538.5; People v Luttenberger (1990) 50 C3d 1; Badillo v Superior Court (1956) 46 C2d 269; Alexander v Superior Court (1973) 9 C3d

387, 390; *Franks v Delaware* (1978) 438 US 154, 155, 98 S Ct 2674; *Theodor v Superior Court* (1972) 8 C3d 77, 103; *People v Box* (1993) 14 CA4th 177, 183.]

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender office]____

Attorney for ____[name of defendant]____

[Begin the following on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

OFFER OF PROOF RE WARRANT CONTROVERSION

_____[Name of police officer]____ **of the** ____[name of police department]____
will testify to the fact that ____[summarize anticipated testimony; attach as an exhibit a copy of any written documentation of the anticipated testimony, and refer to it here]____.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender office]____

Attorney for ____[name of defendant]____

Comment: If evidence that might cast doubt on the veracity of the affiant is unavailable to the defendant because, *e.g.*, the prosecution refuses to disclose the identity of an informant on whose evidence the affiant relied, the defendant may request the court to review specified records or hear testimony of a specified witness in chambers to determine whether the confidential evidence should be revealed to the defendant. To obtain such in chambers review, the defense must support the motion with evidence “casting some reasonable doubt on the veracity of material statements made by the affiant.” *People v Luttenberger* (1990) 50 C3d 1; *People v Estrada* (2003) 105 CA4th 783, 792. This motion, sometimes called a *Luttenberger* motion, may provide evidence on which to base a motion to traverse the search warrant.

A *Luttenberger* motion, though aimed at discovering evidence that may lead to a Fourth Amendment claim, is a discovery motion and should be made far enough in advance of trial so that, if successful, it will be possible to file a timely motion to traverse the search warrant. Local rules should be checked for additional requirements. It is common for special deadlines to be set either by local rule or by practice concerning Pen C §1538.5 motions. This discovery motion must be set enough in advance of the 1538.5 hearing to allow time for it to be heard, and a ruling issued, before the 1538.5 hearing.

Cross-Reference: For further discussion of *Luttenberger* motions, see Crim Law §16.11; California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.7 G. Prosecution Request for Special Search and Seizure Hearing (Pen C §1538.5(j))

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, DEFENDANT, AND DEFENSE COUNSEL:

In the above case, the defendant, __[name]__, was held to answer, but the magistrate granted defendant's motion for the suppression of evidence and/or the return of property. The People, in accordance with Penal Code section 1538.5(j), request a special hearing. The date of this hearing shall be determined on the day of arraignment, which is __[date]__. Notice of this request was given in open court to the defendant, defense counsel, and the Superior Court on __[date]__.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

Comment: A motion for a special hearing under Pen C §1538.5(j) must be filed within 15 calendar days after the preliminary hearing.

When a defendant successfully moves to suppress evidence at the preliminary hearing, and the complaint is not dismissed, the prosecution may

relitigate the validity of the search or seizure at a special de novo hearing provided for in Pen C §1538.5(j). If the evidence is once again suppressed, the prosecutor may litigate the issue once again at trial if evidence not presented at the special hearing becomes available and if the prosecutor can show good cause why (1) the evidence was not presented at the special hearing and (2) the earlier ruling should not bind the trial court. Pen C §1538.5(j).

Cross-Reference: For further discussion of Pen C §1538.5(j) hearings, see California Criminal Law Procedure and Practice, chap 16 (Cal CEB); California Judges Benchbook: Search and Seizure (3d ed CJER-CEB).

§16.8 H. Motion for Return of Seized Property (Pen C §1536)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move for an order directing the __[name of police department]__, the Office of the District Attorney of __[name]__ County, and their agents to turn over to __[name]__, attorney for defendant, the following property seized from defendant's __[residence/vehicle/person]__ on __[date]__ by agents and representatives of the __[name]__ police department __[under __[name]__ Court search warrant no. specify]__: __[List items]__.

This motion will be based on the attached supporting memorandum, the attached declaration(s), __[the attached exhibit(s)]__, evidence taken at the hearing on this motion and argument at that hearing, and on all papers filed and records in this action.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__**Attorney for** __[name of
defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

A court in possession of property legally seized under a search warrant has authority to direct its delivery to the persons entitled to it on a showing of good cause. This authority is within the express power conferred by Penal Code section 1536 and is further within the scope of the inherent power of the court to control and prevent the abuse of its process. *Ensoniq Corp. v Superior Court* (1998) 65 CA4th 1537, 1547; *Buker v Superior Court* (1972) 25 CA3d 1085, 1089. The same rule applies when property is seized without a warrant. See *Gershenhorn v Superior Court* (1964) 227 CA2d 361, 366.

__[Specify why good cause for return of the property is shown under the facts of your case (e.g., retention of property not required for trial preparation or as evidence at trial, possession of property required by defendant), with reference to supporting declaration(s) (e.g., by attorney and defendant)]__.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__**Attorney for** __[name of
defendant]__

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
__[Name]__,
Defendant.

Dept. __[number]__
No. __[case number]__
**[PROPOSED] ORDER FOR
RETURN OF PROPERTY**

**TO __[NAME OF POLICE CHIEF]__, POLICE CHIEF OF __[NAME
OF POLICE DEPARTMENT]__ POLICE DEPARTMENT:**

**On GOOD CAUSE SHOWN, you are ordered to turn over to the
defendant, __[name of defendant and any identifying information]__, the
following item, listed in the police report number ____ (attached), and
seized on __[date]__, from the defendant by __[name of officer]__:**

__[List items to be returned]__

Date: _____

__[Signature]__

Judge of the Superior Court

Comment: This motion includes a proposed order. A certified copy of the order will be required by the police department property room for release of the seized property.

Motion to Disclose Informant's Identity

I. OVERVIEW

- A. Motion to Disclose Identity and Present Whereabouts of Informant or, Alternatively, to Dismiss **§17.1**
- B. Supplementary Defense Motion Concerning In Camera Hearing Procedures **§17.2**

I. OVERVIEW

§17.1

A. Motion to Disclose Identity and Present Whereabouts of Informant or, Alternatively, to Dismiss

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order the prosecution to disclose the true identity and present whereabouts of the informant in the above case, or dismiss the accusatory pleading. This motion will be based on the attached supporting memorandum, __[and/or the attached declaration(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__

Attorney for __[name of
defendant]__

[The supporting memorandum attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

STATEMENT OF FACTS

__[State facts of case, supported by information in police report or search warrant affidavit. Attach copies of those relevant documents as exhibits. Identify number of exhibits attached.]__

ARGUMENT

__[Articulate ways in which informant could exonerate your client. Reasonable speculation is acceptable. Try to be factual and specific. Some examples follow.]__

IF THE INFORMANT IS MATERIAL TO THE GUILT OR INNOCENCE OF THE DEFENDANT, DISMISSAL IS REQUIRED IF THE PROSECUTION REFUSES TO REVEAL THE INFORMANT'S IDENTITY AND PRESENT LOCATION

The police must yield information regarding a confidential informant when the defense makes a showing that the informant might be material on the issue of guilt or innocence. (*Eleazer v Superior Court* (1970) 1 C3d 847.) The penalty for failing to do so is dismissal. (*People v Borunda* (1974) 11 C3d 523, 527.)

To be a material witness, the informant need not be present at the time of the actual arrest (*People v Williams* (1958) 51 C2d 355), nor is it necessary for the defendant to prove that the informant is certain to provide material evidence. The defense need show only "some evidence of a possibility" (*Price v Superior Court* (1970) 1 C3d 836, 843)

or a “reasonable *possibility* that the anonymous informant ... could give evidence on the issue of guilt which might result in defendant’s exoneration” (*People v Garcia* (1967) 67 C2d 830, 840 (emphasis added)).

A defendant need not demonstrate that an informant *would* give favorable testimony or show *what* that informant’s testimony would be. (*People v Tolliver* (1975) 53 CA3d 1036, 1043.) Rather, the accused need only show that the informant was “in a position to perceive ‘... either the commission or the antecedents of the alleged crime.’” (*People v Ingram* (1978) 87 CA3d 832, 839, quoting *Williams v Superior Court* (1974) 38 CA3d 412, 423.) The court in *Williams* analyzed the controlling Supreme Court decisions and concluded:

[T]he evidentiary showing required by those decisions is not as to the exculpatory nature of the informer’s potential testimony but merely as to the quality of the vantage point from which the informer viewed either the commission or the immediate antecedents of the alleged crime. The noted Supreme Court cases ask in effect, “What was the informer *in a position* to perceive?” If the evidence shows that the informer had a sufficiently proximate vantage point, those Supreme Court decisions simply speculate concerning the informer’s potential testimony and hold that the defendant has demonstrated a reasonable possibility that the informant would give evidence which might result in the defendant’s exoneration. Speculation as to such an informer’s testimony is consistent with cases which discern a constitutional right in the accused to seek out the informer to inquire what he knows. (38 CA3d at 423 (emphasis in original).)

Once the defendant has met this minimal showing, disclosure is immediately required unless the prosecution requests a hearing in chambers at which the informant is required to testify under oath. (*People v Gooch* (1983) 139 CA3d 342.)

After the hearing, disclosure is required unless the Court concludes that there is *no* reasonable possibility that nondisclosure could deprive the defendant of a fair trial. (*People v Viramontes* (1978) 85 CA3d 585, 590; *People v Blouin* (1978) 80 CA3d 269, 286; *Williams v Superior Court* (1974) 38 CA3d 412.)

It is important to note that the courts have reversed convictions even in cases in which sales were made directly to police officers, and the officers testified to the identity of the seller. (See *People v*

Durazo (1959) 52 C2d 354; People v Williams (1958) 51 C2d 355; Bowens v Superior Court (1975) 47 CA3d 127.)

The federal law on informant disclosure is in accord. (See McCray v Illinois (1967) 386 US 300, 87 S Ct 1056; Roviato v U.S. (1957) 353 US 53, 77 S Ct 623; Velarde-Villarreal v U.S. (9th Cir 1965) 354 F2d 9.)

THE INFORMANT IS MATERIAL TO THE GUILT OR INNOCENCE OF THE DEFENDANT

[Apply cases cited above and others relevant to your factual situation.]

CONCLUSION

Defendant has made an ample showing of the possible materiality of the informant's evidence. The threshold burden has been met. It is now up to the People to prove to the Court, through the testimony of the informant, that the informant is not in fact material and could in no way aid the defense. If no such testimony is presented, defendant will move for a dismissal.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender office]____

Attorney for _____[name of defendant]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

**DECLARATION IN SUPPORT OF MOTION TO DISCOVER
IDENTITY AND LOCATION OF INFORMANT**

I, _____[name of declarant]____, declare the following:

I am an attorney _____[employed by the _____ County Public Defender's Office,]____ and represent _____[name of defendant]____ in the above-entitled matter.

In the _____[information/indictment/complaint]____, defendant is charged with violating _____[specify code sections]____.

I have read __[specify document, e.g., the affidavit for the search warrant in the above-entitled case; crime report No. X; the preliminary hearing transcript]__.

__[Specify what information in the document cited immediately above supports the theory that the informant is a material witness on the issue of guilt. For example, it may be apparent from one or more of the above documents that the informant was the sole witness to the alleged crime.]__

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ **[Signature of declarant]**__

__ **[Typed name]**__

__ **[Title of declarant if in public office]**__

Comment: This is a discovery motion. Before filing a formal motion for disclosure of the identity of an informant, defense counsel should make an informal request for disclosure. Pen C §1054.5(b). See also Crim Law, chap 11.

It is important to make a sufficient factual showing to support a finding of materiality. See Evid C §1042(c). A declaration of counsel, the defendant, or a witness is usually required to support the allegation that the informant is a material witness on guilt.

WARNING► Do not include the address or phone number of a victim or witness in the motion if you are giving a copy to the defendant. See Pen C §1054.2.

A copy of the search warrant affidavit should be attached as an exhibit when a search warrant was involved.

If, without disclosing the identity of the informant, the prosecution is able to persuade the trial judge that the defendant has not made out a prima facie case for disclosure, *i.e.*, that the informant is not a material witness on the issue of guilt, disclosure is not required. See *People v Oppel* (1990) 222 CA3d 1146, 1152. If the defense does meet its initial burden, or if the prosecution cannot respond to the defendant's allegations without disclosing the informant's identity, the prosecutor may request a hearing in chambers. Evid C §1042(d). Disclosure must be ordered if the evidence presented at both the public and in chambers hearings establishes a reasonable possibility that "nondisclosure might deprive the defendant of a fair trial."

Evid C §1042(d); Crim Law §§17.15–17.20. If the prosecution chooses not to reveal the identity of the informant after the court has concluded that disclosure is necessary to assure the defendant's right to a fair trial, the court must dismiss.

NOTE► In some cases (usually drug cases), the informant's testimony may be relevant only to the sale of the drug, not to possession. In that situation, the prosecution may want to request that the court reduce the charge to possession rather than dismissing the charges altogether.

At the hearing in chambers, the prosecution will have the opportunity to establish that nondisclosure would not compromise the defendant's due process rights, even when the defendant has established a prima facie case for disclosure. *People v Lanfrey* (1988) 204 CA3d 491, 502.

When an informant's information is relevant only to the question of whether there was probable cause to support the issuance of a search warrant, the court is not required to reveal the informant's identity. Evid C §§1041, 1042(b). See *People v Hobbs* (1994) 7 C4th 948, 959 (probable cause determination may be made in chambers). For discussion, see Crim Law §16.10.

Cross-Reference: For discussion of motions to disclose the identity of an informant, see Crim Law, chap 17.

§17.2 B. Supplementary Defense Motion Concerning In Camera Hearing Procedures

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court, in holding a hearing in chambers on disclosure of the identity of the informant, follow certain procedures, discussed below, in the conduct of that hearing in chambers. Defendant does not by this motion withdraw __[his/her]__ objection to the holding of such a hearing in

chambers, and this supplementary motion is made without intending to vitiate that objection in any way. I propose these procedures to try to ensure the defendant's right to confront witnesses:

1. That defense counsel be notified of the time and place of the hearing in chambers so that counsel may be present in the courtroom while the hearing in chambers is being held.

2. That other witnesses, including police officers, be excluded from the hearing in chambers during the testimony of the informant.

3. That the testimony of the informant be taken under oath and be recorded by a court reporter.

4. That, if the informant is shown a photographic lineup, it include at least ___ photos, arranged and fixed on a neutral background, and that the photo lineup be shown to defense counsel before it is shown to the informant.

5. That, if the informant is to be fingerprinted, the fingerprints be given to defense counsel for comparison purposes.

6. That, if the informant's handwriting exemplars are to be taken in chambers, copies also be provided to defense counsel.

7. That at the time of the hearing in chambers, defense counsel be allowed to send written questions into the hearing room for informant to answer. Informant is to answer all the questions. The answers to the questions are to be sent out to defense counsel in the courtroom. Defense counsel will then have the opportunity to send in more questions to be answered in the same way. If the District Attorney believes that any particular answer may tend to disclose the identity of the informant, the District Attorney may object to that answer being sent out to defense counsel, although that answer must be given to the Court and taken down by the court reporter.

8. Defense counsel wishes to bring to the Court's attention that the informant should be warned of ___[his/her]___ privilege against self-incrimination before ___[he/she]___ testifies.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__Attorney for __[name of
defendant]__

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

Evidence Code section 1042(d) requires the Court to order appropriate sanctions when it concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. This decision may be based, according to Evidence Code section 1042(d), on evidence taken in open court and in chambers. (See also *People v Hobbs* (1994) 7 C4th 948, 961.)

Evidence Code section 1042 sets out no details concerning how the proceeding in chambers should be conducted. Defendant in the above-entitled case requests that this Court follow the procedures outlined in the Notice of Motion Concerning Procedures at In Camera Hearing because they will provide defendant with due process protection.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__Attorney for __[name of
defendant]__

Comment: See Comment in §17.1.

Cross-Reference: For discussion of motions to disclose the identity of an informant, see Crim Law, chap 17.

Selected Pretrial Motions

I. OVERVIEW

- A. Pretrial Notice of Motion, Notice of Motion and Motion, or Motion **§18.1**
- B. Memorandum in Support of Motion **§18.2**
- C. Declaration in Support of Motion **§18.3**
- D. Affidavit in Support of Motion **§18.4**
- E. Proposed Order **§18.5**
- F. Declaration of Service by Mail (Documents Deposited in Mail) **§18.6**
- G. Declaration of Service by Mail (Documents Placed for Collection and Mailing) **§18.7**
- H. Attorney Declaration of Service by Mail (Documents Deposited in Mail) **§18.8**
 - I. Declaration of Service by Hand Delivery **§18.9**
 - J. Application for Order Shortening Time; Order **§18.10**
 - K. Memorandum Opposing Motion **§18.11**
 - L. Motion to Disqualify (Recuse) Prosecutor's Office for Bias and Prejudice **§18.12**
 - M. Defense Motion for Discovery (*Murgia* Motion) **§18.13**
 - N. Notice of Motion for Reconsideration and Supporting Memorandum **§18.14**

I. OVERVIEW

§18.1 A. Pretrial Notice of Motion, Notice of Motion and Motion, or Motion

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

[Option 1: Prosecution notice]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on __[date]__, at __[time]__, in Department __[number]__ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move the Court for an order __[state nature of motion and grounds]__.

This motion will be based on the attached supporting memorandum, __[the attached declaration(s), __[the attached exhibit(s),]__ evidence taken at the hearing on this motion, and argument at that hearing]__, and on all papers filed and records in this action.

Date: _____

Respectfully submitted,
 __[Name of district attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[Option 2: Defense notice]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant will move the Court for an order __[state nature of motion and grounds]__.

This motion will be based on the attached supporting memorandum, __[the attached declaration(s), __[the attached exhibit(s),]__ evidence taken at the hearing on this motion, and argument at that hearing]__, and on all papers filed and records in this action.

Date: _____

Respectfully submitted,
 __[Signature of attorney]__
 __[Typed name]__
 __[Title if in public defender office]__
Attorney for __[name of defendant]__

Comment: The terms “notice of motion,” “notice of motion and motion,” and “motion,” as used by California lawyers, are sometimes confusing to new practitioners and attorneys who have practiced in other juris-

dictions. The term “notice of motion” is customarily used because the motion papers are often the first notification the court and other parties receive that the moving party is seeking a legal ruling from the court. When the notice of motion has been served and filed, a motion is deemed to be pending “on all the grounds stated in the written notice.” CCP §1005.5. Consequently, no separate “motion” is required. Depending on local practice, the document filed may be called simply “notice of motion” or it may be called “notice of motion and motion.”

At arraignment or at a pretrial appearance, the court may set future hearing dates for pretrial motions, either on its own motion or at the request of counsel. When a date for a motion has already been set in court, the term “motion” is sometimes used instead of the more common “notice of motion” designation.

NOTE► In most circumstances, the terminology used for the title is less important than the content of the papers. However, when the date on which a motion was made may become important, you may want to title your pretrial papers “Notice of Motion and Motion.”

Parts of motion. The notice of motion must state the date and time for the hearing. A pretrial motion should include the following parts unless other requirements are set out for that motion by statute or by local rule:

- Notice of motion or motion (see CCP §§1005.5, 1010);
- A supporting memorandum (Cal Rules of Ct 4.111); and
- Proof of service (Cal Rules of Ct 4.111; see CCP §1013a); proof of service comes at the end of all papers, including any order, declaration, or exhibit.

A proposed order is frequently attached for the judge’s signature. In addition, many motions require that evidence to support the motion be attached, *e.g.*, an exhibit or a declaration.

Requirement that motion be in writing. Pretrial motions must be in writing, accompanied by a supporting memorandum, unless otherwise ordered by the court or specifically provided by law. Cal Rules of Ct 4.111.

NOTE► Demurrers must be in writing. Pen C §1005.

Setting a hearing date. If there is no preset date for a motion, counsel should check with the clerk’s office before filing a motion to find out the

local practice for setting hearing dates on pretrial motions. There may be special requirements for setting a motion that will require the presentation of evidence.

Time for filing. Pretrial motions, accompanied by a supporting memorandum, must be served and filed at least 10 court days before the time the motion is set for hearing. Proof of service of the moving papers must be filed no later than 5 court days before the time set for the hearing. Cal Rules of Ct 4.111(a). Failure to file, without good cause, a supporting memorandum within the deadline may be considered an admission that the motion is without merit. Rule 4.111(b).

Formatting. The formatting requirements for motions are the same as for other court papers. They are described in §§1.3–1.11.

Where to file papers. Check with the criminal court clerk to find out where to file papers if you are unfamiliar with local practice. It is common to file pretrial motions with the clerk of the judge who will hear the motion, when that information is known.

Clerk can refuse to file papers. Unless good cause is shown for the failure, the clerk of the court must refuse to accept filing papers that do not comply with the format requirements of Cal Rules of Ct 2.3, 2.100–2.119. Cal Rules of Ct 2.118. On Cal Rules of Ct 2.100–2.119, see §§1.3–1.11.

NOTE► The clerk of the court may not refuse to accept handwritten papers or electronically submitted PDFs having the wrong font size. Cal Rules of Ct 2.118(a). The clerk also must not reject a paper for filing solely on the ground that it does not contain an attorney's or a party's fax number or e-mail address on the first page. Cal Rules of Ct 2.118(b).

Where motion will be heard. Many counties have either all pretrial motions or certain types of pretrial motions (*e.g.*, §995 or §1538.5 motions) heard by one judge on a particular day of the week (*e.g.*, Monday).

Cross-Reference: See California Criminal Law Procedure and Practice, chap 18 (Cal CEB).

§18.2 B. Memorandum in Support of Motion

[The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

__[SUMMARY OF ARGUMENT]__

__[The summary of argument section is an optional one. Some lawyers and judges think it is very helpful to be oriented immediately to the main issues being raised. It should be short—one or two paragraphs.]__

__[STATEMENT OF FACTS]__

__[A statement of facts section in the memorandum is optional for most pretrial motions. You should use it when it will help the judge in deciding your motion. For example, a statement of facts is usually included in the supporting memorandum that accompanies a Pen C §995 motion. When a statement of facts is used, it should cite to one or more relevant sources for the facts, e.g., a preliminary hearing transcript, a transcript of a prior hearing, or a police report. Cite to the document by name and by the number or letter you have given it, and to the page number within the document. The documents cited to should be attached as exhibits. See §1.25. If the procedural posture of the case is confusing, you may want to have a separate “statement of the case.”]__

__[ARGUMENT]__

__[The “Argument” heading is optional. When a statement of facts section or a summary of argument section is used, you may wish to add an “Argument” heading to let the reader know that the actual argument section has started.]__

I. __[Title of first argument. Argument headings are usually put in capital letters and either centered, or each line is indented the same number of spaces. A roman numeral is usually put in front of each one, but that is not required. Some lawyers do not number them, while others use Arabic numerals. While Cal Rules of Ct 2.108(1) generally requires either double or one-and-one-half line spacing, some attorneys single-space the argument headings. Check local practice.]__

__[Under the heading, it is common to skip a line, then begin the argument. You should set out the law that supports the heading in simple, declarative sentences, then apply it to the facts of your case. (See the examples in the memorandums for the various motions in this forms manual.) Judges read many motions and prefer concise language and short memorandums. Be sure that your cites are accurate. Shepardize

*them to make sure cases have not been overruled or depublished. Statutes, rules, and case citations are either underlined or in italics, and usually put in parentheses. The official California citation style is in *Jessen, California Style Manual* (4th ed 2000).]*__

[II.]__*[Continue stating points, citing authorities, and arguing position advanced.]*__

[III]. CONCLUSION

__*[Summarize in one brief paragraph the relief you are requesting and why it should be granted. (For examples, see the conclusions in the various memorandums in this forms manual.) It is not uncommon for lawyers to neglect to specify the relief they desire; the judge may deny a motion if he or she has not been asked for any particular relief.]*__

[Option 1: Prosecution signature block]

Date: _____

Respectfully submitted,

__*[Name of District Attorney]*__

District Attorney

__*[Signature of deputy district attorney]*__

__*[Typed name]*__

Deputy District Attorney

[Option 2: Public defender signature block]

Date: _____

Respectfully submitted,

__*[Name and title of Public Defender if filed by a public defender]*__

__*[Signature of attorney]*__

__*[Typed name]*__

__*[Title]*__

Attorney for __*[name of defendant]*__

[Option 3: Private defense counsel signature block]

Date: _____

Respectfully submitted,

__*[Signature of attorney]*__

__*[Typed name]*__

Attorney for __*[name of defendant]*__

Comment: A memorandum must be filed in support of a pretrial motion in a criminal case unless the court orders otherwise, or unless case law or statute specifically does not require it. Cal Rules of Ct 4.111(a). If the moving party fails to include a memorandum *without good cause*, the court may consider that failure to be an admission that the motion is without merit. Rule 4.111(b). Despite this rule, it is common in some counties for counsel, particularly the Public Defender, to argue some pretrial motions orally, without a supporting written motion. You should check the practice in the court in which your motion will be heard.

Written pretrial motions must be filed with the court at least 10 court days before the hearing on the motion; proof of service must be filed at least 5 court days before the hearing on the motion. Cal Rules of Ct 4.111(a).

It is helpful to begin work on the supporting memorandum by listing each heading before writing the arguments that go under them. The headings should lead logically through each step in the argument to the conclusion. In writing the arguments, the law should be stated as briefly as possible, followed by application of the law to the facts of the case.

Cross-Reference: For more detailed discussion of pretrial motions, see Crim Law, chap 18.

§18.3 C. Declaration in Support of Motion

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.]

See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

DECLARATION OF __[NAME]__ IN SUPPORT OF __[IDENTIFY MOTION]__

I, __[name]__, **declare** __[under penalty of perjury/on information and belief]__:

1. I am __[identity of declarant, e.g., the attorney for the defendant in this case]___. __[Continue with statements of fact in successively numbered paragraphs]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[Signature of declarant]__

__[Typed name]__

__[Title of declarant if in public
office]__

Comment: A declaration may be substituted for an affidavit. CCP §2015.5. Declarations are usually used because they do not require the services of a notary public. The caption of the declaration must state the name of the declarant and specifically identify the motion it supports or opposes. See Cal Rules of Ct 3.1115 (civil law and motion). See also Cal Rules of Ct 1.6(21).

The closing paragraph of this form may be used when the declaration is made either within or outside California. See CCP §2015.5.

Declarations may be made under penalty of perjury, or on information and belief, depending on the use being made of the declaration. When a declaration is being used as evidence of facts, it must be made under penalty of perjury. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201; *Tyler v Superior Court* (1980) 102 CA3d 82. However, affidavits on information and belief by defense counsel have been accepted to support *Pitchess* motions. See, e.g., *People v Municipal Court (Hayden)* (1980) 102 CA3d 181.

Cross-Reference: For further discussion of declarations, see Crim Law §18.5.

§18.4 D. Affidavit in Support of Motion

[An affidavit filed separately from the notice of motion or motion must have a caption. See the sample caption in §1.12.

Otherwise, no caption is needed. See Cal Rules of Ct 2.111 (caption required on first page only). Each affidavit accompanying a motion should begin on a separate page.]

**AFFIDAVIT OF __[NAME]__ IN SUPPORT OF __[SPECIFY
MOTION]__**

__[Name of affiant]__, **being sworn, says** __[under penalty of perjury/on information and belief]__:

1. I am __[identity of affiant]__.

2. __[Continue with statements of fact in successively numbered paragraphs]__.

3. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__[Signature of affiant]__

__[Typed name]__

Subscribed and sworn to before me on __[date]__, **at** __[state and county]__.

[Notary or officer's seal]

__[Signature of notary or officer]__

__[Typed name]__

__[Title, e.g., Notary Public]__

Comment: A notary public must witness the signature on an affidavit; however, a declaration does not require a notary public. A declaration may be substituted for an affidavit. CCP §2015.5. For this reason, attorneys usually use declarations. See §18.3.

The caption of an affidavit must state the name of the declarant and specifically identify the motion it supports or opposes. See Cal Rules of Ct 3.1115 (civil law and motion). See also Cal Rules of Ct 1.6(21) (declaration includes affidavit).

The closing paragraph of this form may be used when the affidavit is made either within or outside California. See CCP §2015.5.

Cross-Reference: For more information on affidavits and declarations, see California Criminal Law Procedure and Practice §18.5 (Cal CEB).

§18.5 E. Proposed Order

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, below.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**
Plaintiff
vs
_____[Name]_____,
Defendant.

Dept. ____[number]____
No. ____[case number]____
[PROPOSED] ORDER
____[SPECIFY NATURE OF
ORDER SOUGHT]____

The ____[defendant's/prosecution's]____ motion for ____[specify nature of order sought]____ was regularly heard on ____[date]____. Present at the hearing were ____[give names of attorney for defendant, and of prosecutor]____.

Satisfactory proof having been made and good cause appearing,

IT IS ORDERED that:

1. ____[Set out each term of the order in numbered paragraphs]____.

Date: _____

____[Signature of Judge]____

____[Typed name]____

Judge of the Superior Court

*[If judge requests that order be approved as to form by
opposing counsel:]*

Approved as to form and content:

Date: _____

____[Signature of attorney]____

____[Typed name]____

Comment: A proposed order should always include a separate caption. If incorporated in or attached to the motion, the proposed order usually follows all other parts of the motion except the proof of service. Counsel should consult local rules or the court clerk in the county in which the motion is being filed for information about local practice with respect to proposed orders. In Los Angeles County, for example, the proposed order should be served and filed with the motion papers, but it should not be included in or attached to the motion papers. Los Angeles Ct R 8.6(b). The proposed order is lodged with the court but is not filed until signed by the judge. Los Angeles Ct R 8.6(b).

The nature of the order should be specified in the caption. “Order” or “Order of Court” with nothing more is insufficient. Examples of a proper description of the paper include “[Proposed] Order for Blood Sample to Be Transferred” or “[Proposed] Order Sustaining Demurrer.” Los Angeles County requires “[Proposed]” be part of the caption and that there be at least two blank lines above the judge’s signature line. Los Angeles Ct R 8.6(b).

§18.6 F. Declaration of Service by Mail (Documents Deposited in Mail)

PROOF OF SERVICE BY MAIL

I, __[name]__, declare:

I am over age 18, not a party to this action, and __[reside/am employed]__ in _____ County at __[address]__. On __[date]__, I deposited in the United States mail at __[place, e.g., city and state]__ a copy of the attached __[title or description of each paper]__ in a sealed envelope, with postage fully prepaid, addressed to __[name and address of each person served]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ [Signature of declarant]____
 _____ [Typed name]__

Comment: Attach the declaration of service to the back of papers being filed. Declarations of service by mail are governed by CCP §§1012–1013a. Alternative forms for service are in §§18.7–18.9.

If you are filing by mail, enclose a self-addressed stamped envelope large enough and with enough postage for the clerk to return a date/time stamped copy to you confirming that the motion was filed.

Cross-Reference: See general discussion of service in California Criminal Law Procedure and Practice §18.7 (Cal CEB).

§18.7 G. Declaration of Service by Mail (Documents Placed for Collection and Mailing)

PROOF OF SERVICE BY MAIL

I, __[name]__, declare:

I am over age 18, not a party to this action, and __[reside/am employed]__ in _____ County at __[address]__. On __[date]__, following ordinary business practices, I placed for collection and mailing at the office of __[name of business]__, located at __[address]__, a copy of the attached __[title or description of each paper]__ in a sealed envelope, with postage fully prepaid, addressed to __[name and address of each person served]__.

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ __[Signature of declarant]__
 _____ __[Typed name]__

Comment: Attach the declaration of service to back of papers to be filed. Declarations of service by mail are governed by CCP §§1012–1013a. Alternative forms for service are in §§18.6, 18.8–18.9.

§18.8 H. Attorney Declaration of Service by Mail (Documents Deposited in Mail)

PROOF OF SERVICE BY MAIL

I, __[name]__, certify:

I am an active member of the State Bar of California and am not a party to this action. My business address is __[address]__. On __[date]__, I deposited in the United States mail at __[place, e.g., city and state]__ a copy of the attached __[title or description of each paper]__ in a sealed envelope, with postage fully prepaid, addressed to __[name and address of each person served]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ [Signature of declarant]____
 _____ [Typed name]____
 _____ [Title of declarant if in public
 office]____

Comment: Attach the declaration of service to the back of papers being filed. Declarations of service by mail are governed by CCP §§1012–1013a. Alternative proof of service forms are in §§18.6–18.7, 18.9.

Cross-Reference: See the general discussion of service in California Criminal Law Procedure and Practice §18.7 (Cal CEB).

§18.9 I. Declaration of Service by Hand Delivery

[Option 1: Declaration of personal service]

The undersigned deposes and says:

That I am an employee of the _____ [name of law office]____; that I am over the age of 18 years and not a party to the above-mentioned action; that my business address is _____ [address]____.

That, on _____ [date]____, I personally served a true copy of _____ [title of document served]____ in the matter of *People v* _____ [name of defendant]____ on the following party: _____ [Name]____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ [Signature of declarant]____
 _____ [Typed name]____
 _____ [Title of declarant if in public
 office]____

[Option 2: Acknowledgment of receipt]

Received by: _____ [signature of person accepting motion]____; _____ [usually either counsel or counsel's office staff]____

Date: _____

Comment: Personal or substituted service of pretrial motions is allowed under CCP §1011. It is common for public defenders and alternate counsel in the same building as the district attorney to have their office staff personally serve the district attorney. Defense counsel may also personally serve the district attorney when in the courthouse for an appear-

ance. When this is done, counsel usually has the deputy district attorney to whom the papers are given write on defense counsel's copy of the motion "Received by," followed by the deputy's name, and the date. On the less frequent occasions when the prosecution is filing a motion, the same process may be used.

Alternate forms for service are in §§18.6–18.8.

Cross-Reference: For further discussion of service, see California Criminal Law Procedure and Practice §18.7 (Cal CEB).

§18.10 J. Application for Order Shortening Time; Order

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

APPLICATION FOR EX PARTE ORDER SHORTENING NOTICE TIME ON __[NAME]__'S MOTION FOR __[SPECIFY NATURE OF ORDER SOUGHT]__; DECLARATION

1. I am __[e.g., the prosecutor]__ in this action.
2. It is necessary that the hearing on the attached motion for __[specify nature of order sought]__ take place, and the order issue, on __[date]__, for the following reasons: __[State reasons]__.
3. I have notified __[describe counsel who have been notified, e.g., the Public Defender]__ that this application would be presented at this time and place by __[briefly describe method of notifying other counsel]__.
4. __[Continue declarant's statements, if any]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of declarant]____

_____[Typed name]____

_____[Title of declarant if in public office]____

[A proposed order should begin on a new page. See, e.g., *Los Angeles Ct R 8.6(b)* (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

[PROPOSED] ORDER

Good cause appearing,

IT IS ORDERED that:

1. The motion of __[e.g., the prosecution]__ **for an order** __[state nature of order, papers for which were submitted with the above application,]__ **may be heard on** __[date]__.

2. This order and the attached notice of motion and supporting papers must be served __[by personal delivery]__ **on the attorney of record for each party** __[and on each unrepresented party]__ **by** __[date]__.

Date: _____

__[Signature of Judge]__

__[Typed name]__

Judge of the Superior Court

Comment: If an attorney needs to have a hearing on a motion sooner than the 10 court days prescribed by Cal Rules of Ct 4.111(a), counsel should apply for an order shortening time. If possible, counsel should obtain opposing counsel's stipulation and attach that to the application. The application may be typed at the end of the notice of motion or on a separate sheet attached to and served with the moving papers. The application for order shortening time should be accompanied by a declaration. See Cal Rules of Ct 3.1300(b) (affidavit or declaration must accompany application for order shortening time in civil law and motion cases). See also Cal Rules of Ct 1.6(21) (declaration includes affidavit). Because applications for orders shortening time are made ex parte, counsel should be sure to serve opposing counsel and provide proof of service. See Cal Rules of Ct 3.1206. Many courts allow the request to be made orally at the time the motion is set in court, and rule on it at that time.

Cross-Reference: Applications for orders shortening time are discussed in Crim Law §18.6.

§18.11 K. Memorandum Opposing Motion

[The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

MEMORANDUM IN OPPOSITION

__[SUMMARY OF ARGUMENT]__

__[Optional. Some lawyers and judges think it is very helpful to be oriented immediately to the main issues being raised. If you include a summary of argument, it should be short—one or two paragraphs.]__

__[STATEMENT OF FACTS]__

__[Optional. Start with a statement of the facts relevant to the motion if the moving party did not accurately state the facts in his or her motion. For detailed discussion of the statement of facts section, see §18.2.]__

__[ARGUMENT]__

[The heading "Argument" is only needed if you have included either a Statement of Facts or a Summary of Argument section.]

I. __[Title of first argument. State points of law, authorities, and argument concerning the first argument. For further discussion, see §18.2.]__

[II.] __[Continue stating points, citing authorities, and arguing position advanced.]__

[III.] CONCLUSION

WHEREFORE, __[e.g., the prosecutor]__ **respectfully requests that**
 __[name]__'s **motion** __[specify nature of motion]__ **be denied.**

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Title if in public office]__

Attorney for __[name of defendant]__

Comment: It is common in many counties for the prosecution not to file a written opposition to most pretrial motions. Some motions, such as Pen

C §§995 and 1538.5 motions, are commonly governed by local rules. When the defense opposes a prosecution motion, written opposition is usually filed.

The opposition memorandum is prepared in the same format as that of the moving party. See §§1.3–1.11. It must have a caption and a proof of service. Cal Rules of Ct 2.111, 4.111. It may also include declarations or affidavits, depending on the requirements of the particular motion. See CCP §§2003, 2009, 2015.5. It must be filed at least 5 court days before the hearing on the motion. Cal Rules of Ct 4.111.

A reply to an opposition memorandum is not required, nor is it commonly filed. When used, it follows the same format as the opposition memorandum.

Cross-Reference: On responding to pretrial motions, see Crim Law §18.8.

§18.12 L. Motion to Disqualify (Recuse) Prosecutor's Office for Bias and Prejudice

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court make an order under Penal Code section 1424 recusing __[Deputy District Attorney name/the Office of the District Attorney of _____ County]__ from performing any prosecution duties in the above-entitled case. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____

Attorney for ____[name of
defendant]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

DECLARATION OF ____[NAME]____ IN SUPPORT OF RECUSAL MOTION

I, ____[name]____, declare as follows:

1. I am the attorney of record for defendant ____[name]____ in the above-entitled case.

2. The following facts exist that create a conflict of interest between ____[Deputy District Attorney name/the Office of the District Attorney of _____ County]____ and defendant that would render it unlikely that defendant would receive a fair trial: ____[State facts that provide grounds for recusal]____.

____[State legal authorities in support of motion. See cases in Crim Law §§18.26–18.31.]____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of declarant]____

_____[Typed name]____

Attorney for ____[name of
defendant]____

[A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff

vs

**[Name]____,
Defendant.**

Dept. ____ [number]____

No. ____ [case number]____

[PROPOSED] ORDER

RECUSING ____ [NAME OF

DEPUTY OR OFFICE BEING

RECUSED]____

/

This action came on regularly for hearing on ____ [date]____, in Department ____ [number]____ of this Court, the Honorable ____ [name]____, Judge, presiding. ____ [Name]____ appeared as attorney for the People and ____ [name]____ appeared as attorney for the defendant. Oral and documentary evidence was presented and the matter submitted for decision. The Court makes the following findings based on that evidence: ____ [State findings]____.

Good cause appearing,

IT IS HEREBY ORDERED that, pursuant to Code of Civil Procedure section 128 and Penal Code section 1424 ____ [Deputy District Attorney name/the Office of the District Attorney of ____ County]____ is recused from performing the duties of prosecutor in the above-entitled case.

Date: ____ [Signature of Judge]____

____ [Typed name]____

Judge of the Superior Court

Comment: Notice of a recusal motion must be served on the district attorney and the Attorney General at least 10 court days before the hearing date on the motion. Any motion to disqualify a prosecutor must contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied on by the moving party and must be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. Pen C §1424(a)(1). The same procedures apply when the prosecuting agency is a city attorney or city prosecutor. Pen C §1424(b)(1).

Recusal requires a conflict of interest that is so severe as to disqualify the district attorney from acting. *People v Superior Court (Humberto S.)* (2008) 43 C4th 737; *Hollywood v Superior Court* (2008) 43 C4th 721;

Haraguchi v Superior Court (2008) 43 C4th 706. A defendant who seeks to recuse not just an individual prosecutor but the entire prosecuting office must make an especially persuasive showing. *People v Gamache* (2010) 48 C4th 347.

After briefing on a recusal motion, the trial court must determine whether or not an evidentiary hearing is necessary. Pen C §1424(a)(1). The abuse-of-discretion standard applies on review of a trial court's decision to deny an evidentiary hearing. At a minimum, to establish such an abuse of discretion the moving party must show that it submitted sufficient affidavits to establish a prima facie case for disqualification. *Spaccia v Superior Court* (2012) 209 CA4th 93, 111.

Cross-Reference: For further discussion of recusal motions, see Crim Law §§18.26–18.31.

§18.13 M. Defense Motion for Discovery (*Murgia* Motion)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move the Court for an order to produce, for inspection and copying, the documents and other items and information listed in Exhibit A, which is attached to this notice of motion.

This motion is made on the ground that good cause exists for granting the discovery requested, in that defendant seeks discovery of specific evidence within the possession, custody, or control of the State of California by its agent, __[name]__, and the District Attorney's office, that is material to the defense of selective prosecution.

This motion is based on this notice, the records and files in this action, the attached supporting memorandum, the attached declaration of __[name]__, attorney for defendant, the attached exhibit (Exhibit A), and any oral and documentary evidence that may be presented at the hearing on this motion.

Date: ____ [Signature of attorney] ____
 ____ [Typed name] ____
 ____ [Title if in public defender
 office] ____
Attorney for ____ [name of
 defendant] ____

[The supporting memorandum should start on a new page.
 Caption is unnecessary if attached to papers with caption
 and first-page caption includes all parts of motion. See §1.9;
 California Criminal Law Procedure and Practice §18.5 (Cal
 CEB).]

SUPPORTING MEMORANDUM

I. RIGHT TO DISCOVERY

The defendant in a criminal proceeding is entitled to discover all relevant and reasonably accessible information in the possession of the prosecution that will enable the defendant to prepare and present the defense. *Murgia v Municipal Court* (1975) 15 C3d 286; *Pitchess v Superior Court* (1974) 11 C3d 531; *Hill v Superior Court* (1974) 10 C3d 812.

The defendant in this case needs the requested discovery to show that ____ [he/she] ____ was deliberately singled out for prosecution on the basis of an invidious criterion, and that this prosecution would not have occurred but for the discriminatory design of the prosecution. See *People v Superior Court (Hartway)* (1977) 19 C3d 338, 348; *People v Superior Court (Baez)* (2000) 79 CA4th 1177.

II. GOOD CAUSE

“If an individual can show that he would not have been prosecuted except for such invidious discrimination against him, a basic constitutional principle has been violated, and such a prosecution must collapse upon the sands of prejudice.” *Murgia v Municipal Court* (1975) 15 C3d 286, 290. ____ [Discuss cases tending to support discovery of information showing discriminatory prosecution of the kind that you maintain is present in this case. Apply those cases to the facts in your case.] ____

III. CONCLUSION

Because the documents and records listed in Exhibit A are relevant to the defense in this case, and because the contents of those documents and records are otherwise inaccessible, defendant asks this court to exercise its discretion to order production of those documents and records listed in Exhibit A. The interests of justice mandate disclosure of this information lest defendant lose the fundamental right to a fair trial.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.

See §1.9; Crim Law §18.5.]

DECLARATION

I, __[name]__, declare that:

1. I am the attorney for the defendant, __[name]__, in this action.

2. On information and belief, there is good cause to require production of the information sought by this motion (and listed in Exhibit A, which is attached to this motion) for the following reasons: __[Set forth facts sufficient to show good cause under the particular facts of the case, i.e., the reasons that defendant alleges he or she has been the victim of discriminatory enforcement.]__

3. On information and belief, __[name of agency or officer having custody of information sought]__ has possession or control of the information requested in this motion, and this information is inaccessible to defendant.

4. The evidence sought to be discovered is material to defendant's defense of discriminatory prosecution.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ [Signature of declarant]_____
 _____ [Typed name]_____
 _____ [Title of declarant if in public
 office]_____
Attorney for _____ [name of
 defendant]_____

EXHIBIT A

[List all documents, records, statements, and other information
 to be discovered that would tend to show discriminatory
 enforcement.]

Comment: A criminal defendant may obtain dismissal of the criminal charges brought by the government on the ground that the prosecution is being conducted in an arbitrary or discriminatory manner. Known as a *Murgia* motion, after the landmark case of *Murgia v Municipal Court* (1975) 15 C3d 286, 291, the first step is to make a motion to obtain discovery, typically records relating to other arrests or prosecutions for the same offense, that would prove that the government is acting in an impermissibly discriminatory manner. Because a *Murgia* motion is a discovery motion, it may only be brought after the prosecution has failed to respond to an informal request for the information sought. Pen C §1054.5(b).

A declaration in support of a *Murgia* motion may be made on information and belief. *Griffin v Municipal Court* (1977) 20 C3d 300.

Cross-Reference: See Crim Law §§18.16–18.25.

§18.14 N. Notice of Motion for Reconsideration and Supporting Memorandum

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

[Option 1: Prosecution notice]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on __[date]__, at __[time]__, in Department __[number]__ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move for reconsideration of __[describe order or ruling]__.

The moving party believes the above-described __[order/ruling]__ **should be reconsidered by the Court because** __[state reason]__.

This motion will be based on the attached supporting memorandum, __[the attached declaration(s), __[the attached exhibit(s),]__ evidence taken at the hearing on this motion, and argument at that hearing]__, **and on all papers filed and records in this action.**

Date: _____

Respectfully submitted,
__[Name of district attorney]__
District Attorney
__[Signature of deputy district attorney]__
__[Typed name]__
Deputy District Attorney

[Option 2: Defense notice]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ **COUNTY, STATE OF CALIFORNIA:**

PLEASE TAKE NOTICE that, on __[date]__, **in Department** __[number]__ **at** __[time]__, **or as soon thereafter as the matter may be heard, the defendant will move for reconsideration of** __[describe order or ruling]__.

The moving party believes the above-described __[order/ruling]__ **should be reconsidered by the Court because** __[state reason]__.

This motion will be based on the attached supporting memorandum, __[the attached declaration(s), __[the attached exhibit(s),]__ evidence taken at the hearing on this motion, and argument at that hearing]__, **and on all papers filed and records in this action.**

Date: _____

Respectfully submitted,
__[Signature of attorney]__
__[Typed name]__
__[Title if in public defender office]__
Attorney for __[name of defendant]__

[The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[Option 1: Motion made before entry of judgment]

A court may correct judicial error in the making of interim orders or in limine rulings until pronouncement or entry of a judgment. (*People v DeLouize* (2004) 32 C4th 1223, 1231.) The __[order/ruling describe order or ruling]__ is pre-judgment. A motion for reconsideration made before entry of judgment may be based on an error in law, facts or both.

[Option 2: Motion made after entry of judgment]

Post-judgment reconsideration can only be sought for a material change in law (*People v DeLouize* (2004) 32 C4th 1223, 1233) or clerical error (*People v McGee* (1991) 232 CA3d 620, 624). The distinction between clerical error and judicial error is whether the error was made in rendering the judgment or in recording the judgment rendered. *Smith v Superior Court* (1981) 115 CA3d 285, 290.

[Continue]

[State facts and argument supporting reconsideration]

[Option 1: Prosecution signature block]

Date: _____

Respectfully submitted,

__[Name of District Attorney]__

District Attorney

__[Signature of deputy district attorney]__

__[Typed name]__

Deputy District Attorney

[Option 2: Public defender signature block]

Date: _____

Respectfully submitted,
__[Name and title of Public
Defender if filed by a public
defender]__
__[Signature of attorney]__
__[Typed name]__
__[Title]__
Attorney for __[name of
defendant]__

[Option 3: Private defense counsel signature block]

Date: _____

Respectfully submitted,
__[Signature of attorney]__
__[Typed name]__
Attorney for __[name of
defendant]__

Comment: Motions for reconsideration are disfavored. *People v DeLouize* (2004) 32 C4th 1223, 1232. The Code of Civil Procedure sections (CCP §§128, 473, 1008) that govern motions for reconsideration in civil cases do not apply in criminal cases. *Smith v Superior Court* (1981) 115 CA3d 285, 291.

A court may correct judicial error in the making of interim orders or in limine rulings until pronouncement or entry of a judgment. *People v DeLouize* (2004) 32 C4th 1223, 1231. An order granting a new trial, because it requires further proceedings before a judgment, is also an interim order. 32 C4th at 1232.

On the other hand, post-judgment reconsideration can only be sought for a material change in law (32 C4th at 1233) or clerical error (*People v McGee* (1991) 232 CA3d 620, 624).

Cross-Reference: See Crim Law §§18.2–18.9.

Right to Speedy Trial

I. OVERVIEW

- A. Defense Motion to Dismiss (Due Process) **§19.1**
- B. Defense Motion to Dismiss (Speedy Trial) **§19.2**
- C. Defense Motion to Dismiss for Violation of Statutory Deadlines **§19.3**
- D. Notice of Intent to Withdraw General Time Waiver **§19.4**
- E. Demand by Prisoner to Dismiss Under Pen C §1381 or §1381.5 **§19.5**

I. OVERVIEW

§19.1 A. Defense Motion to Dismiss (Due Process)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court dismiss the accusatory pleading filed herein on the grounds that the prosecution of the defendant has been unreasonably delayed, violating the defendant's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. The delay was __[specify duration, e.g., more than 14 months from the date the crime allegedly occurred on September 27, 2012, until the defendant was arrested on November 30, 2013]__. **This motion will be based on the attached supporting memorandum, __[the attached declaration[s], the attached exhibit[s],]__ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.**

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__**Attorney for** __[name of
defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM**SUMMARY OF ARGUMENT**

__[Summarize your argument in two to three sentences.]__

STATEMENT OF FACTS

__[Give the relevant facts, e.g., the dates that frame the due process issue, information on the defendant's availability during this period, and prosecution efforts to find the defendant. Give the relevant information about the prejudice the defendant has suffered. Cite to authority such as police reports and witness statements, and attach them as exhibits.]__

ARGUMENT

[Select those arguments that follow that are relevant, and add any others that apply]

PREACCUSATION DELAY IS COVERED BY THE RIGHT TO DUE PROCESS OF LAW GUARANTEED UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A delay between the time a crime is committed and the filing of a formal accusation or arrest, whichever comes first, is covered by the constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (*Scherling v Superior Court* (1978) 22 C3d 493, 505.) The right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death

or disappearance of witnesses, the loss or destruction of material physical evidence (*People v Martinez* (2000) 22 C4th 750, 767), and the change of a material witness's testimony over time (*People v Mirenda* (2009) 174 CA4th 1313, 1331). The initial burden in establishing the due process violation is on the defendant seeking dismissal who must demonstrate prejudice attributable to the delay in arrest. Only after the defendant has done so must the court determine if the delay was justified and engage in the balancing process. (*People v Lowe* (2007) 40 C4th 937, 943; *Serna v Superior Court* (1985) 40 C3d 239, 249; *Scherling v Superior Court* (1978) 22 C3d 493, 505.)

In the present case, the crime allegedly occurred on __[date]__, while the prosecution did not begin until __[a complaint was filed/the defendant was arrested/an indictment issued]__ on __[date]__. The period of delay was __[specify duration]__.

THE DELAY IN THIS CASE PREJUDICED THE DEFENDANT'S ABILITY TO PREPARE THE DEFENSE

__[You must show actual prejudice. *Serna v Superior Court*, supra. Tailor the following material to fit the facts of your case. The two main factors are the length of delay and the prejudice to the defendant. For example, if it is a felony case, select published cases that concern felonies with a period of delay and/or the types of prejudice similar to those that exist in your case.]__

The delay of __[specify period of delay]__ in the instant case is longer than delays found unreasonable in __[use those cases of the following (and other cases you find) with periods of delay shorter than that in your case]__. (See *Kehlor v Municipal Court* (1953) 116 CA2d 845 (seven weeks may be de facto unreasonable); *Rost v Municipal Court* (1960) 184 CA2d 507 (lapse of 140 days between filing of complaint and service of arrest warrant without explanation held on its face to be unreasonable when defendant was otherwise available for service); *People v Kerwin* (1972) 23 CA3d 466 (90-day delay in bringing defendant to trial unreasonable under circumstances).)

Defendant was prejudiced because __[explain why, e.g., a material witness was deported (*People v Mejia* (1976) 57 CA3d 574, 579), evidence has disappeared, the memory of a potential witness has faded (*People v Lowe* (2007) 40 C4th 937, 946), or the defendant cannot now remember where he or she was at the time the crime allegedly occurred. Use those

cases of the following, and others you find through your research, that concern the types of prejudice in your case.]_ _.

Prejudice may be shown by loss of a material witness or other material evidence, material change in the testimony of an independent eyewitness, or fading memory caused by lapse of time. (*People v Lowe* (2007) 40 C4th 937, 946; *People v Archerd* (1970) 3 C3d 615; *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182; *People v Mirenda* (2009) 174 CA4th 1313, 1331; *People v Sahagun* (1979) 89 CA3d 1.)

In *Rice v Superior Court* (1975) 49 CA3d 200, there had been an eleven-month delay between the issuance of the indictment and the warrant and the defendant's arrest on the charges. Despite the fact that the police had made some effort to locate the defendant, the court of appeal felt that simple investigative techniques would have, in fact, located the defendant earlier, and ordered the indictment dismissed. The court said:

The same issue was faced in *Jones, supra*, [citation omitted] also involving a delayed arrest. At page 740 the court said: "Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and secure evidence of his activities at the time of the event in question." "Delaying the arrest of the accused may hinder his ability to recall or reconstruct his whereabouts at the time the alleged offense occurred...." (*Rice v Superior Court, supra*, at p. 206.)

Other cases reiterate the above principles. In *People v Hill* (1984) 37 C3d 491, the California Supreme Court held that a showing that *prosecution* witnesses' memories were fading was sufficient to support a finding that the delay prejudiced the defendant's rights to due process and a speedy trial.

In *People v Mirenda* (2009) 174 CA4th 1313, the court ruled that an unjustified 25-year delay supported dismissal of prosecution before trial when prejudice to the defendant arose from the death of important witnesses, the irreparable fading of memories, and the complete inability to mount a defense.

In *Ibarra v Municipal Court* (1984) 162 CA3d 853, the court held that a defendant's allegation of *his own memory impairment* was sufficient to shift the burden of justifying the delay to the prosecution.

Because the prosecution had not justified the delay, the court of appeal reversed the trial court's finding.

In *Garcia v Superior Court* (1984) 163 CA3d 148, the court ruled that, on a showing that witnesses were unable to recall the events of the case due to the delay, the burden of justifying the delay shifted to the prosecution.

In *Fowler v Superior Court* (1984) 162 CA3d 215, evidence was lost due to the delay. No justification was presented to the trial court by the prosecution. The court of appeal remanded the matter to the trial court for reconsideration of the denial of defendant's motion.

[Tell what efforts defendant has engaged in to attempt to refresh recollection. See *Serna v Superior Court* (1985) 40 C3d 239.]

[Continue]

The defendant in this case has been prejudiced both by __ [summarize the prejudice suffered by the defendant, already described above] __, and by the other factors recognized by the United States Supreme Court in *U.S. v Marion* (1971) 404 US 307, 92 S Ct 455, as quoted in *Serna v Superior Court* (1985) 40 C3d 239, 251:

Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends....

ONCE THE DEFENDANT SHOWS PREJUDICE, THE BURDEN SHIFTS TO THE PROSECUTION TO SHOW JUSTIFICATION. THE COURT MUST WEIGH ANY JUSTIFICATION AGAINST THE PREJUDICE, AND IF THE JUSTIFICATION DOES NOT OUTWEIGH THE PREJUDICE, MUST DISMISS THE CHARGES.

Once the defendant has shown prejudice, as the defendant has in this case, the burden shifts to the prosecution to try to demonstrate justification for the delay. (See *Scherling v Superior Court* (1978) 22

C3d 493, 505; *People v Mirenda* (2009) 174 CA4th 1313, 1329.) The court must then weigh any prejudice to the defendant resulting from the delay against justification for the delay. (*People v Catlin* (2001) 26 C4th 81; *Scherling v Superior Court* (1978) 22 C3d 493, 505. See also *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182; *Serna v Superior Court* (1985) 40 C3d 239.) If the justification does not outweigh the prejudice, the court must dismiss the charges. See *Jones v Superior Court* (1970) 3 C3d 734. Minimal prejudice may support dismissal if the prosecution does not justify the delay. *People v Mirenda* (2009) 174 CA4th 1313, 1327.

UNDER CALIFORNIA LAW, DELAY IN PROSECUTING A CASE IS UNLAWFUL WHETHER NEGLIGENCE OR PURPOSEFUL

Under California law, evidence of deprivation of due process sufficient to warrant dismissal does *not* require a showing of purposeful delay by the prosecution. Prejudicial delay caused by negligence of law enforcement agencies or by the prosecution is sufficient to deny a defendant the right to due process. (*Scherling v Superior Court* (1978) 22 C3d 493, 507; *Penney v Superior Court* (1972) 28 CA3d 941, 953.)

Even if the delay is merely the result of administrative misfeasance or simple negligence on the part of the state or its officers, it is clear that there must, nonetheless, be a dismissal. (*Plezbert v Superior Court* (1971) 22 CA3d 169; *Penney v Superior Court* (1972) 28 CA3d 941; *Rice v Superior Court* (1975) 49 CA3d 200, 205; *Sykes v Superior Court* (1973) 9 C3d 83; *Jones v Superior Court*, *supra*; *Barker v Wingo*, *supra*.)

[If a federal due process claim will be made, it probably must be shown that the delay was both prejudicial and intentional.

See U.S. v Crouch (5th Cir 1996) 84 F3d 1497, 1509.]

CONCLUSION

The delay of __[specify nature of delay]__ was a violation of defendant's right to due process under the __[United States Constitution/California Constitution/Constitutions of the United States and California]__ because __[explain why; e.g., the delay was lengthy, the defendant was prejudiced by the delay, the prosecution made no effort whatsoever to try to locate the defendant, and there appears to be no justification for this delay]__. The defendant therefore respectfully asks this Court to dismiss the accusatory pleading.

Date: ____

Respectfully submitted,

____[Signature of attorney]____

____[Typed name]____

____[Title if in public defender
office]____Attorney for ____[name of
defendant]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.

See §1.9; Crim Law §18.5.]

[The following declaration is an example of a declaration made by defense counsel]

DECLARATION OF ____[NAME OF DECLARANT]____ IN SUPPORT OF MOTION TO DISMISS

1. I, ____[name of declarant]____, am the attorney for the defendant in the above-entitled case.

2. I declare under penalty of perjury that ____[State facts within your personal knowledge supporting contention that government's delay caused prejudice to defendant or that delay was intentional. See discussion in Crim Law §19.3. Note that the defense has the burden of showing prejudice by competent evidence at the hearing. Defendant should also execute a declaration because most facts will be within his or her knowledge. See sample defendant's declaration immediately following this one]____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: ____ [Signature of declarant]____

____[Typed name]____

____[Title of declarant if in public
office]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.

See §1.9; Crim Law §18.5.]

[The following declaration is an example of a declaration made by the defendant.]

DECLARATION OF __[NAME OF DEFENDANT]__ IN SUPPORT OF MOTION TO DISMISS

I, __[name of defendant]__, declare as follows:

1. From __[date]__, and continuing until __[date]__, I resided at __[address, city, state]__, and since then continuing to the present, I have resided at __[address, city, state]__.

2. On __[date]__, I was first __[specify how defendant first became aware of this case, e.g., arrested]__ regarding this case. Before that date, I did not know that this case existed.

3. On __[date]__, I was first furnished a copy of the police report concerning this case.

4. I have done nothing to avoid service or cause delay in the prosecution of this case.

__[Add other relevant information, e.g., the delivery of a letter from the police department to defendant's home after defendant had moved; the fact that defendant was in jail (particularly if defendant was in custody with same authorities who eventually arrested him or her on the present case). Describe any prejudice. Attach as exhibits whatever is relevant.]__

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of defendant]____

_____[Typed name]____

Comment: Due process, rather than speedy trial, covers preaccusation delay between the time a crime is committed and the time a person is arrested or charged, whichever is first. *People v Belton* (1992) 6 CA4th 1425, 1433. While dismissal generally is the remedy for a due process violation, the court has the discretion to fashion another remedy. *People v Mirenda* (2009) 174 CA4th 1313, 1330.

These motions may be decided on the basis of declarations and affidavits. See *People v Sahagun* (1979) 89 CA3d 1. Declarations made on information and belief are insufficient to establish facts. The declarations attached to this motion, therefore, should not be made on information and belief. See *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 87, citing *Brown v Happy Valley Fruit Growers* (1929) 206 C 515, 520.

Cross-Reference: For further discussion, see Crim Law §§19.3, 19.9–19.12.

§19.2 B. Defense Motion to Dismiss (Speedy Trial)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court dismiss the accusatory pleading filed herein on the grounds that the prosecution of the defendant has been unreasonably delayed, violating the defendant's right to a speedy trial guaranteed by __[the Sixth and Fourteenth Amendments to the United States Constitution/article I, section 15 of the California Constitution]__. The delay was __[specify duration, e.g., more than 14 months from the filing of the complaint on September 27, 2012, until the defendant was arrested on November 30, 2013]__. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s),]__ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: __[]__

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page.

Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

__ [Summarize your argument in two to three sentences.] __

STATEMENT OF FACTS

__ [Give the relevant facts, e.g., the dates that frame the speedy trial issue, information on the defendant's availability during this period, and prosecution efforts to find the defendant.] __

ARGUMENT

THE RIGHT TO A SPEEDY TRIAL GUARANTEED UNDER
__ [SPECIFY WHETHER ERROR IS ALLEGED UNDER U.S. OR CALI-
FORNIA CONSTITUTION, OR BOTH] __ **APPLIES TO THIS CASE**

[The following arguments concern denial under the U.S. Constitution. A person becomes an accused under that constitution in misdemeanor cases on arrest or when a complaint is filed. In a felony case, a person becomes an accused under the U.S. Constitution only when an indictment issues or an information is filed. The U.S. Constitution is most commonly used in misdemeanor cases and when an indictment issues. It is also used when no actual prejudice can be shown because that is not required under the U.S. Constitution.]

The Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." The right to a speedy trial is a "fundamental right granted to the accused and ... the policy of the law since the time of the promulgation of the Magna Carta and the Habeas Corpus Act." (Harris v Municipal Court (1930) 209 C 55, 60.)

The constitutional right to a speedy trial is triggered when a defendant becomes "an accused." __ [Under the United States Constitution, a person becomes an accused in a misdemeanor case on arrest or when a misdemeanor complaint is filed, whichever occurs first. (Serna v Superior Court (1985) 40 C3d 239, 262.) In felony cases, a person becomes an accused under the United States Constitution only on a holding order following a preliminary hearing, or when an indictment is filed. (People v Hannon (1977) 19 C3d 588, 605.)] __

In the present case, __[the defendant was arrested/a misdemeanor complaint was filed/an indictment issued/a holding order issued]__ **on** __[date]___. **The prosecution did not begin until** __[specify when prosecution began, e.g., __[date]__], when defendant was arraigned in Department number]__ __[of this Court]__.

Under federal speedy trial analysis, the trial court is to consider and balance the following four factors to evaluate a claimed violation: length of the delay; reason for the delay, defendant's assertion of the right; and prejudice to the defendant. (*Vermont v Brillion* (2009) 556 US 81, 129 S Ct 1283; *Doggett v U.S.* (1992) 505 US 647, 112 S Ct 2686; *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182.) The length of the delay is to some extent a triggering mechanism. Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182.

[Use when prejudice may be presumed for purposes of requiring a hearing.]

THE DELAY IN THIS CASE WAS SUFFICIENTLY PREJUDICIAL TO REQUIRE A HEARING

At a certain point, delay in prosecution becomes so prejudicial that the "defendant need not establish actual prejudice as a prerequisite to a hearing" at which the trial court must weigh this prejudice against the justification offered by the People. (*Serna v Superior Court* (1985) 40 C3d 239, 252; *Stabio v Superior Court* (1994) 21 CA4th 1488; *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182; *Harris v Municipal Court* (1930) 209 C 55; *Guttermann v Municipal Court* (1930) 209 C 65.) This is sometimes called "presumed prejudice."

__[Apply above cases to your facts. Note that if the offense is a misdemeanor, a delay of more than the 1-year statute of limitations period is presumed prejudicial. *Serna v Superior Court*, supra. In a felony case, a delay exceeding the applicable felony statute of limitations period is presumptively prejudicial. *Stabio v Superior Court*, supra.]__

__[Apply the *Barker v Wingo* analysis to the facts of your case. See the cases on prejudice that begin on p 7 of this motion; some may be relevant to your arguments.]__

[The following arguments concern denial under the California Constitution.]

Postaccusation delay is covered by article I, section 15 of the California Constitution: "The defendant in a criminal cause has the right to a speedy public trial...." (See also Penal Code section 686.) The California provision for a speedy trial "'reflects the letter and spirit of' the Sixth Amendment to the United States Constitution...." (*People v Wilson* (1963) 60 C2d 139, 144 n2.)

The right to a speedy trial is a "fundamental right granted to the accused and ... the policy of the law since the time of the promulgation of the Magna Carta and the Habeas Corpus Act." (*Harris v Municipal Court* (1930) 209 C 55, 60.) In an effort to implement this constitutional right, the California legislature has enacted a number of specific provisions providing certain time limits. However, the constitutional guarantees are self-executing, and specific legislation is not necessary to bring into effect the rights guaranteed thereunder. (*Harris v Municipal Court* (1930) 209 C 55, 60.) Consequently, it remains for the courts to determine whether a defendant's constitutional rights have been impinged, even though no specific statute may have been violated. (*Jones v Superior Court* (1970) 3 C3d 734; *Barker v Municipal Court* (1966) 64 C2d 806; *Rost v Municipal Court* (1960) 184 CA2d 507.)

These constitutional rights are triggered when a defendant becomes "an accused." Under the California Constitution, a defendant becomes an accused when a complaint in either a felony or misdemeanor case is filed, when an indictment issues, or on arrest. (*Serna v Superior Court* (1985) 40 C3d 239.)

In the present case, the __[defendant was arrested/complaint was filed/indictment issued]__ on __[date]__. __[Describe what ended the period of delay. Most commonly, the filing of a complaint begins the time period, and the defendant's arrest ends the period of delay.]__

The test that applies to the right to speedy trial under the California Constitution is that any actual prejudice to the defendant resulting from the delay must be weighed against any justification for the delay. (*People v Hill* (1984) 37 C3d 491, 496.)

[Use to show actual prejudice.]

THE DELAY IN THIS CASE PREJUDICED THE DEFENDANT'S ABILITY TO PREPARE THE DEFENSE

[Tailor the following material to show that actual prejudice occurred in your case. For example, if it is a felony case, select published cases that concern felonies with a period of delay and/or the types of prejudice that are similar to those that exist in your case.]

The delay of __ *[specify period of delay]* __ **in the instant case is longer than delays found unreasonable in** __ *[use those cases of the following (and other cases you find) with periods of delay longer than that in your case. See, e.g., Kehlror v Municipal Court (1953) 116 CA2d 845 (seven weeks may be de facto unreasonable); Rost v Municipal Court (1960) 184 CA2d 507 (lapse of 140 days between filing of a complaint and service of the arrest warrant without explanation held on its face to be unreasonable when defendant was otherwise available for service); People v Kerwin (1972) 23 CA3d 466 (90-day delay in bringing defendant to trial unreasonable under the circumstances).]* __

Defendant was prejudiced because __ *[explain why, e.g., a material witness was deported, or defendant cannot now remember where he or she was at the time the crime allegedly occurred. Add factors such as anxiety, loss of income, and curtailment of speech and association, when relevant. U.S. v Ewell (1966) 383 US 116, 86 S Ct 773. Use those cases of the following, and others you find through your research, that concern the types of prejudice in your case. Try to select cases in which the rulings are based on the Constitution on which you are relying.]* __

Prejudice may be shown by loss of a material witness or other material evidence, or fading memory caused by lapse of time. (*People v Archerd* (1970) 3 C3d 615; *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182; *People v Sahagun* (1979) 89 CA3d 1.) In *Rice v Superior Court* (1975) 49 CA3d 200, there had been an 11-month delay between the issuance of the indictment and the warrant and the defendant's arrest on the charges. Despite the fact that the police had made some effort to locate the defendant, the court of appeal felt that simple investigative techniques would have, in fact, located the defendant earlier, and ordered the indictment dismissed. The court said:

The same issue was faced in *Jones v Superior Court* (1970) 3 C3d 734, also involving a delayed arrest:

Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and secure evidence of his activities at the time of the event in question.

3 C3d at 740. Delaying the arrest of the accused may hinder his or her ability to recall or reconstruct his or her whereabouts at the time the alleged offense occurred. (*Rice v Superior Court* (1975) 49 CA3d 200, 206.)

Other cases reiterate the above principles. In *People v Hill* (1984) 37 C3d 491, the California Supreme Court held that a showing that *prosecution* witnesses' memories were fading was sufficient to support a finding that the delay prejudiced the defendant's rights to due process and a speedy trial.

In *Ibarra v Municipal Court* (1984) 162 CA3d 853, the court held that a defendant's allegation of *his own memory impairment* was sufficient to shift the burden of justifying the delay to the prosecution. Because the prosecution had not justified the delay, the court of appeal reversed the trial court's finding.

In *Garcia v Superior Court* (1984) 163 CA3d 148, the court ruled that, on a showing that witnesses were unable to recall the events of the case due to the delay, the burden of justifying the delay shifted to the prosecution.

In *Fowler v Superior Court* (1984) 162 CA3d 215, evidence was lost due to the delay. No justification was presented to the trial court by the prosecution. The court of appeal remanded the matter to the trial court for reconsideration of the denial of defendant's motion.

[Continue]

The defendant in this case has been prejudiced both by __[summarize the prejudice suffered by the defendant, already described above]__, and by the other factors recognized by the United States Supreme Court in *U.S. v Marion* (1971) 404 US 307, 92 S Ct 455, as quoted in *Serna v Superior Court* (1985) 40 C3d 239, 251:

Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends....

[Use the following to argue error under the California Constitution. To argue under the federal Constitution, argue four factors: prejudice, justification, length of delay, and defendant's assertion of the right. See Crim Law §§19.5–19.6.]

ONCE THE DEFENDANT SHOWS PREJUDICE, THE BURDEN SHIFTS TO THE PROSECUTION TO SHOW JUSTIFICATION; THE COURT MUST WEIGH ANY JUSTIFICATION AGAINST THE PREJUDICE AND, IF THE JUSTIFICATION DOES NOT OUTWEIGH THE PREJUDICE, MUST DISMISS THE CHARGES

Once the defendant has shown prejudice, as the defendant has in this case, the burden shifts to the prosecution to try to demonstrate justification. (See *Scherling v Superior Court* (1978) 22 C3d 493, 505.) The court must then weigh “any prejudice to the defendant resulting from the delay ... against justification for the delay.” (22 C3d at 505; see *People v Sahagun* (1979) 89 CA3d 1; *Jones v Superior Court* (1970) 3 C3d 734, 741 n1. See also *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182; *Serna v Superior Court* (1985) 40 C3d 239.)

__[Describe those prosecution efforts at locating the defendant that are known to you and why they are outweighed by the prejudice to the defendant.]__

THE PROSECUTION FAILED TO PROCEED WITH SATISFACTORY DILIGENCE IN PROSECUTING THIS OFFENSE

The prosecution has a duty to employ all reasonable means to bring an accused promptly to trial. (*Rice v Superior Court* (1975) 49 CA3d 200; *Plezbert v Superior Court* (1971) 22 CA3d 169; *Jones v Superior Court* (1970) 3 C3d 734.) In both *Jones* and *Rice* it was held that there is “no requirement that an accused must seek out the police and invite arrest.” (*Jones v Superior Court* (1970) 3 C3d 734, 741; *Rice v Superior Court* (1975) 49 CA3d 200, 205.) And in *Sykes v Superior Court* (1973) 9 C3d 83, 94, the California Supreme Court held that “a speedy trial requires prompt action upon the part of all who are officially concerned, at the least, to the extent that adjudication of a defendant’s rights shall not be stifled by the procrastination of officials.”

__[Describe prosecution efforts to find the defendant, referring to facts in documents attached to this motion as exhibits, and describe defendant’s availability, referring to facts in either counsel’s or defendant’s dec-

laration, which is attached to this motion. Use cases similar on their facts to those in your case to show how unreasonable the prosecution efforts were at bringing the defendant before the court. See, e.g., the cases in Crim Law §§19.11–19.12.]__

DELAY IN PROSECUTING A CASE IS UNLAWFUL WHETHER NEGLIGENCE OR PURPOSEFUL

Evidence of deprivation of defendant's right to a speedy trial sufficient to warrant dismissal does *not* require a showing of purposeful delay by the prosecution. Prejudicial delay caused by negligence of law enforcement agencies or by the prosecution is sufficient to deny a defendant the right to due process. (*Scherling v Superior Court* (1978) 22 C3d 493, 507; *Penney v Superior Court* (1972) 28 CA3d 941, 953.)

Even if the delay is merely the result of administrative misfeasance or simple negligence on the part of the state or its officers, it is clear that there must, nonetheless, be a dismissal. (*Plezbart v Superior Court* (1971) 22 CA3d 169; *Penney v Superior Court* (1972) 28 CA3d 941; *Rice v Superior Court* (1975) 49 CA3d 200, 205; *Sykes v Superior Court* (1973) 9 C3d 83; *Jones v Superior Court*, *supra*; *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182.)

CONCLUSION

The delay of __[specify nature of delay]__ was a violation of the defendant's right to a speedy trial under the __[United States Constitution/California Constitution/Constitutions of the United States and California]__ because __[explain why; e.g., the delay was lengthy, the defendant was prejudiced by the delay, and the prosecution made no effort whatsoever to try to locate the defendant]__. The defendant therefore respectfully asks this Court to dismiss the accusatory pleading.

Date: _____

Respectfully submitted,
 __[Signature of attorney]__
 __[Typed name]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

[The following declaration is made by defendant.]

**DECLARATION OF _____ [NAME OF DECLARANT] _____ IN
SUPPORT OF MOTION TO DISMISS**

1. I, _____ [name of declarant] _____, am the defendant in the above-entitled case.

2. I declare under penalty of perjury that _____ [state facts supporting contention that government's delay caused prejudice to defendant or that delay is presumptively prejudicial. (Note that burden of showing prejudice will have to be proven at hearing by competent evidence.)] _____

3. At all times from the alleged commission of this offense, I was _____ [state the defendant's whereabouts and arrest record since the alleged commission of the offense. (Be detailed. You may want to attach as exhibits (and have defendant refer in this declaration) to evidentiary support, e.g., rent receipts, phone bills, arrest reports.)] _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ _____ [Signature of declarant] _____
 _____ [Typed name] _____

Comment: The speedy trial right covers the period of postaccusation delay, between the time when a defendant becomes “an accused” and when he or she is first made aware of the case (usually by being arrested). See *Serna v Superior Court* (1985) 40 C3d 239; *People v Hannon* (1977) 19 C3d 588. The tests used under the federal and state constitutions are different, as is, perhaps, the time when the right attaches. On the difference between state and federal speedy trial guaranties, see Crim Law §§19.4–19.6.

Cross-Reference: On the right to speedy trial generally, see Crim Law, chap 19.

§19.3 C. Defense Motion to Dismiss for Violation of Statutory Deadlines

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court dismiss the above-described accusatory pleading on the grounds that __[specify violation, e.g., defendant's preliminary hearing is set for a date beyond the ten-day requirement of Pen C §859b]__. This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s),]__ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[This memorandum contains authorities to fit a variety of factual situations. Edit out inapplicable authorities and discuss your facts in light of the relevant ones. Add other cases and arguments you find through your research.]

SUMMARY OF ARGUMENT

__[Summarize your argument in two to three sentences.]__

SUMMARY OF FACTS

__[Briefly give the relevant facts, e.g., the statutory authority for the issue involved, the date time began to run and when it ended, and when the trial court has set the case for the relevant hearing or trial.]__

ARGUMENT

THE PROSECUTION VIOLATED THE DEFENDANT'S SPEEDY TRIAL RIGHTS UNDER __[SPECIFY RELEVANT STATUTE, E.G., PEN C §1382]__

Penal Code section __[specify statute, e.g., 1382]__ **states in relevant part:** __[quote the relevant portion of the applicable statute]__.
 __[Describe how the facts of your case fit in the requirements of this statute.]__

DEFENDANT OBJECTED TO THE __[SPECIFY RELEVANT STATUTE, E.G., PENAL CODE SECTION 1382]__ **VIOLATION IN A TIMELY FASH-ION.**

Defendant's only duties concerning statutory deadlines are to object when the date is set beyond the time period, and to move to dismiss when the period expires, or simply to move to dismiss if the period expires without a date being set. (*Sykes v Superior Court* (1973) 9 C3d 83, 94; *Vukman v Superior Court* (1981) 116 CA3d 341, 349, disapproved on other grounds in *People v Cuevas* (1995) 12 C4th 252, 275 (no duty to object when date already expired).) This defendant has done.

In this case, defendant neither applied for nor acquiesced in an extension of the __[specify applicable deadline]__-day period beginning on __[date]__. On __[date]__, defendant objected to the date requested by the prosecution, but defendant's objection was overruled. This has resulted in a violation of Penal Code section __[specify relevant section, e.g., 1382]__. Thus, this court must dismiss the action. (*Owens v Superior Court* (1980) 28 C3d 238; *People v Johnson* (1980) 26 C3d 557; *Sykes v Superior Court* (1973) 9 C3d 83.)

DEFENDANT'S __[TYPE OF PROCEEDING, E.G., TRIAL]__ **WAS DELAYED BEYOND THE PERIOD PRESCRIBED IN PENAL CODE SECTION** __[SECTION NUMBER, E.G., 859(a)]__ **AND DEFENDANT SUFFERED PREJUDICE DUE TO THE DELAY.**

__[Specify the statute involved, give the relevant facts in your case, and apply the statute and relevant cases to your facts. The most common issues challenged are delay of the preliminary hearing (Pen C §859b); failure to file the information within 15 calendar days after the defendant was held to answer (Pen C §1382(a)(1)); delay of the trial (Pen C §1382(a)(2)); violation of a statute of limitations; and failure to try or sentence a prisoner serving time on another case who has asked to be tried or sentenced on a pending case (Pen C §§1381, 1381.5, 1389). On the statutory right to speedy trial, see *Crim Law*, chap 19.]__

THERE WAS NO GOOD CAUSE FOR A CONTINUANCE.

Good cause for the court's continuance was not shown. "Good cause" has been held not to exist when, e.g., the cause of delay was court congestion and lack of resources (*People v Flores* (2009) 173 CA4th Supp 9); the district attorney wishes to await results of a probation revocation (*Ayers v Superior Court* (1978) 86 CA3d 945); courts were unavailable because judges were at a seminar (*Lewis v Superior Court* (1981) 122 CA3d 494); a material witness was absent and no diligence was shown in obtaining the witness (*Owens v Superior Court* (1980) 28 C3d 238; *Cunningham v Municipal Court* (1976) 62 CA3d 153, 156; *People v Bracamonte* (1967) 253 CA2d 980, 984).

CONCLUSION

Defendant respectfully submits that there has been a violation of the time limits set forth in Penal Code section __ [specify relevant section, e.g., 1382] __. __ [Explain briefly that you have met the other requirements, e.g., that such violation has not been justified by the People, that the defendant has properly preserved the issue by objection and motion, and has not waived any of the rights under this section, and that therefore dismissal is mandatory under the law] __.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion.
See §1.9; Crim Law §18.5.]

DECLARATION OF __ [NAME OF DECLARANT] __ IN SUPPORT OF MOTION TO DISMISS

1. I declare under penalty of perjury that the facts stated in the below document not otherwise supported by citations to the record, exhibits, or other documents are true and correct of my own knowledge. I further declare as to any facts alleged on information and belief, that I believe them to be true and correct under penalty of perjury.

2. __[State facts of case. Specify dates and state what was said in court. Declaration must state that defendant did not waive time, or that defendant withdrew time waiver (specify when withdrawn); that defendant objected to date set; when time ran; any excuses given by D.A. or court to show good cause for delay; and any other facts that are necessary to decide issue as to information alleged only on information and belief, state that in the relevant numbered paragraph(s).]__

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of declarant]____

_____[Typed name]____

_____[Title of declarant if in public office]____

Comment: If the defendant neither applied for nor acquiesced in an extension of statutory deadline, objected to the date requested by the prosecution, and that objection was overruled, the violation of the statutory deadline may require dismissal of the action. See *Owens v Superior Court* (1980) 28 C3d 238; *People v Johnson* (1980) 26 C3d 557; *Sykes v Superior Court* (1973) 9 C3d 83.

Cross-Reference: For discussion of statutory speedy trial issues, see Crim Law, chap 19.

§19.4 D. Notice of Intent to Withdraw General Time Waiver

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__ at __[time]__, or as soon thereafter as the matter may be heard, defendant will withdraw the previously entered general time waiver.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____**Attorney for** ____[name of
defendant]____

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

Penal Code section ____[1382(a)(2)(A)/1382(a)(3)(A)]____ **permits defendants in** ____[misdemeanor/felony]____ **cases to withdraw in open court a general time waiver after notice to all parties:** ____[Quote applicable section: Pen C §1382(a)(2)(A) (felony cases) or Pen C §1382(a)(3)(A) (misdemeanor cases)]____.

This notice is intended to serve the purpose of the statute.

Date: _____

Respectfully submitted,

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____**Attorney for** ____[name of
defendant]____

Comment: This form may be used as a notice of intent to withdraw a general time waiver in either a felony or misdemeanor case. After notice to all parties, the withdrawal must be made in open court; time deadlines begin from that date. See Pen C §1382(a)(2)(A), (a)(3)(A).

Cross-Reference: On the speedy trial right generally, see Crim Law chap 19.

§19.5

E. Demand by Prisoner to Dismiss Under Pen C §1381 or §1381.5

[Attorney's letterhead]

To: __[Name of inmate]__
 __[Address]__
 __[City, State]__

RE: Request for Penal Code Section __[1381/1381.5]__ Demand

Dear __[name of inmate]__:

Attached please find forms for your use. Please fill in and sign the three copies of the forms, __[in Pen C §1381 demands add: and have the warden or jailer fill out and sign the Endorsement]__, then return all three copies in the enclosed self-addressed envelope and we will serve the District Attorney.

Date: _____

Very truly yours,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

__[Name of inmate]__

__[Address]__

__[City, State]__

To: Office of the District Attorney

__[Name of county]__

__[Address]__

__[City, State]__

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

NOTICE OF DEMAND FOR TRIAL OR DISPOSITION

PURSUANT TO PENAL CODE SECTION __[1381/1381.5]__

TO THE DISTRICT ATTORNEY OF _____ COUNTY:

PLEASE TAKE NOTICE that I, __[name of inmate; give aliases, if relevant]__, was sentenced on or about __[date]__, to serve a term of __[length of term]__ in __[name of correctional institution]__, located at __[address]__. On or about __[date]__, in _____ County, I was __[charged with/convicted of]__ violating __[specify section of Penal or other Code or name of offense]__. The __[name of]__ __[county]__ County case number is __[case number/warrant number]__. Under the

provisions of Penal Code section __[1381/1381.5]__, I desire, and hereby demand, that I be __[brought to trial/sentenced]__ on the charge(s) set forth above, and on any and all other pending charges.

Date: _____ __[Signature of inmate]__
 _____ __[Typed name]__

[Use the following for Pen C §1381 demands]

ENDORSEMENT OF CUSTODIAL LAW ENFORCEMENT:

Cause of Commitment: _____

Date of Commitment: _____

Date of Release: _____

_____[Signature of warden or
 jailer]_____
 _____[Typed name]_____
 _____[Title]_____

Comment: Motions to dismiss (or try or sentence) a prisoner are brought under Pen C §1381 when the prisoner is in jail or in state prison in California serving time on another case. Motions to dismiss (or try or sentence) a prisoner are brought under Pen C §1381.5 when the prisoner is in a federal prison in California serving time on another case. Unlike Pen C §1381, Pen C §1381.5 does not require that the defendant be brought to court until federal authorities agree to release the defendant for purposes of complying with the §1381.5 request.

Many defense attorneys completely fill out the form before sending it to the prisoner for his or her signature in case the prisoner has trouble filling it in correctly or does not have the information.

The cover letter accompanying the notice asks the prisoner to sign the notice and return it to the attorney, who then forwards it to the district attorney. This is important. Proof of service on the district attorney is crucial. Certified mail, return receipt requested, is recommended, or a copy should be personally served on the district attorney's office, and a signature obtained from the person who accepted receipt.

If the case is dismissed, the prosecution may refile as long as the prosecution is not precluded from doing so by Pen C §1387.

Cross-Reference: For discussion of Pen C §§1381 and 1381.5 demands, see California Criminal Law Procedure and Practice §§19.33–19.34 (Cal CEB).

Continuances

I. OVERVIEW

A. Motion for Continuance §20.1

I. OVERVIEW

§20.1 A. Motion for Continuance

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT AND TO __ [THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT AND DEFENSE COUNSEL]__:

PLEASE TAKE NOTICE that, on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, __[the District Attorney/defendant]__, __[name]__ will make a motion that the court order the above-entitled matter continued pursuant to Penal Code section 1050 until __[date]__. The matter is currently scheduled for __[specify proceeding, e.g., trial]__ on __[date]__.

This motion is made on the following grounds: __[summarize factual grounds supporting continuance request]__.

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, __[the attached declaration(s), the attached exhibit(s)]__, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public office]____

Attorney for _____[name of
defendant]____

[The supporting memorandum of points and authorities should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

[Option 1: DEFENSE memorandum]

SUPPORTING MEMORANDUM

THE DEFENDANT IS ENTITLED TO A CONTINUANCE ON A SHOWING OF GOOD CAUSE

Penal Code section 1050(b) provides that:

To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary....

Penal Code section 1050(e) further provides that “Continuances shall be granted only upon a showing of good cause.” The request must be supported by declarations, unless the court first finds good cause to excuse the notice and declaration requirement. The declaration must be executed under penalty of perjury. (*Brown v Superior Court* (1987) 189 CA3d 260, 265.) _____[Discuss how you have met each of these requirements.]____.

The grant or denial of a motion for continuance is an act within the Court’s discretion (*Ungar v Sarafite* (1964) 376 US 575, 589, 931, 84 S Ct 841), but this discretion is not without bounds:

While the determination of whether in any given case a continuance should be granted normally rests in the discretion of the trial court, that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. (*Jennings v Superior Court* (1967) 66 C2d 867.)

Although the Court must consider the welfare of witnesses (Pen C §1050(g)) and the right of the People to a speedy disposition (Pen C §1050(a)), it must also consider the defendant's right to a fair trial. (*People v Courts* (1985) 37 C3d 784, 794. See also *People v Murphy* (1963) 59 C2d 818 (error to deny continuance to prepare following last-minute amendment by prosecution).)

[Add specific arguments relevant to your situation. The following are examples that may be applied to the facts of your case if relevant.]

The defendant is entitled by statute to a continuance at arraignment to secure counsel. (Penal Code section 859.)

The defendant is entitled by statute to a continuance at the time set for preliminary hearing to secure counsel. (Penal Code section 860.)

If a defendant cannot secure counsel for the preliminary hearing, it must be postponed "for not less than two nor more than five days." (Penal Code section 860.)

The constitutional right to counsel (United States Constitution, Amendment VI; California Constitution article I, section 15) requires that a defendant be given a reasonable continuance to secure counsel of his or her choice (*People v Courts* (1985) 37 C3d 784, 789; *People v Byoune* (1966) 65 C2d 345), if the defendant can show that he or she is financially able to secure counsel (*People v Lee* (1967) 249 CA2d 234, 241; see *People v Parks* (1964) 230 CA2d 805, 811).

The right to counsel (United States Constitution, Amendment VI; California Constitution article I, section 15) includes the right to adequately prepare a defense (*People v Maddox* (1967) 67 C2d 647, 652), including the right to prepare and argue motions and objections before, during, and after trial. (*Cooper v Superior Court* (1961) 55 C2d 291, 302. See also Pen C §1049 (five-day period to prepare for trial required after plea).)

New counsel has the same right to a reasonable time to prepare as did previous counsel. (See *People v Simpson* (1939) 31 CA2d 267.)

The unavailability of a witness whose testimony has a legitimate tendency to prove or disprove a fact that could influence the decision in the case is good cause for a continuance. (See *People v Dunstan* (1922) 59 CA 574, 584. See also *Owens v Superior Court* (1980) 28 C3d

238, 250.) __ *[Describe what you expect the testimony to be; explain why the testimony is not cumulative of other evidence; specify efforts used to secure the witness's presence; explain how counsel can secure the witness's attendance within a reasonable time. See the information in the declaration below concerning an unavailable witness.]* __

Physical incapacity of the defendant or defense counsel is good cause for a continuance. (*People v Crovedi* (1966) 65 C2d 199.)

When a defendant joins in requesting a continuance caused by defense counsel's court commitments on behalf of other clients, the court must grant the continuance until either defense counsel can appear or the defendant can obtain other counsel. (*People v Manchetti* (1946) 29 C2d 452, 458.)

CONCLUSION

For the above reasons, defendant requests a continuance of __ *[specify type of proceeding]* __ **from** __ *[date now set]* __ **to** __ *[date you want matter continued to]* __.

Date: _____

Respectfully submitted,

__ *[Signature of attorney]* __

__ *[Typed name]* __

__ *[Title if in public defender office]* __

Attorney for __ *[name of defendant]* __

[Option 2: PROSECUTION memorandum]

SUPPORTING MEMORANDUM

THE PROSECUTION HAS COMPLIED WITH THE PENAL CODE SECTION 1050(b) REQUIREMENTS

The prosecution has complied with the procedural requirements of Penal Code section 1050(b): This motion is in writing, accompanied by a declaration detailing specific facts showing that a continuance is necessary, and was served on all parties to the proceeding __ *[state how many days before the proceeding you served other parties; service must be at least two court days before the proceeding sought to be continued]* __.

GOOD CAUSE FOR A CONTINUANCE EXISTS BECAUSE __[SUMMARIZE WHY THERE IS GOOD CAUSE FOR A CONTINUANCE]__

Penal Code section 1050(e) allows the prosecution to obtain a continuance of any hearing, __[including the trial,]__ on a showing of good cause. Good cause for a continuance of the __[hearing/trial]__ in this case exists because __[specify why]__.

[Add specific arguments relevant to your situation. The following is a sampling of relevant authorities.]

The charge in this case, __[state charge]__, is an offense listed in Penal Code section __[specify section, e.g., 11165.1(a)]__. The deputy assigned to this case, __[name]__, has another __[specify proceeding, e.g., trial; state department in which deputy works; state why another deputy cannot try the case; and estimate how long the other proceeding is expected to take]__. This constitutes good cause for a continuance under Penal Code Section 1050(g).

This case is set for __[specify proceeding, e.g., trial]__ on __[date]__. __[If no speedy trial statute will be violated by continuing the matter to a particular date in the future, state that. Then explain why you need a continuance.]__

The codefendant in this case, __[name]__, has had __[his/her]__ case continued to __[date]__. This is good cause under Penal Code section 1050.1 for continuing the defendant's case to the same date so that the cases may remain joined.

__[The defendant/A defense witness]__ testified at trial, which was not anticipated by the prosecution because __[explain why, e.g., the defense gave you no discovery concerning this witness, or because the witness testified to matters outside the discovery given to you]__. This is good cause under Penal Code section 1051 for a continuance.

The unavailability of a witness whose testimony has a legitimate tendency to prove or disprove a fact that could influence the decision in the case is good cause for a continuance. (See *People v Dunstan* (1922) 59 CA 574, 584. See also *Owens v Superior Court* (1980) 28 C3d 238, 250.) __[Describe what you expect the testimony to be; explain why the testimony is not cumulative of other evidence; specify efforts used to secure the witness's presence; explain how counsel can secure the witness's attendance within a reasonable time. See the information in the declaration below concerning an unavailable witness.]__

The defense has consented to a continuance of this matter. Although that does not by itself constitute good cause, it is a factor to be considered in making a good cause determination.

CONCLUSION

For the above reasons, defendant requests a continuance of __[specify type of proceeding]__ from __[date now set]__ to __[date you want matter continued to]__.

Date: _____

Respectfully submitted,
 __[Name of District Attorney]__
District Attorney
 __[Signature of deputy district attorney]__
 __[Typed name]__
Deputy District Attorney

[Continue]

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

[The following is a declaration in support of a generic motion for continuance.]

DECLARATION OF __[NAME OF DECLARANT]__ IN SUPPORT OF MOTION FOR CONTINUANCE

I, __[name of declarant]__, do hereby declare:

1. That I am __[e.g., the attorney for __[name of defendant]]__ or the deputy district attorney assigned to the above-entitled case]__.

2. That this case is presently set for __[specify proceeding, e.g., trial]__ at __[time]__ on __[date]__ in Department __[number]__.

3. That a continuance of the __[specify proceeding, e.g., trial]__ for at least __[number]__ days is necessary because __[state reasons the requested number of days is required]__.

4. That I have notified the __[defense/prosecution]__ witnesses of this motion, the date of the hearing on this motion, and their right to be heard by the court, as required by Penal Code section 1050(b).

[Add if relevant]

5. That this motion was not filed two court days before the __[specify proceeding, e.g., trial]__ **, as required by Penal Code section 1050(b), because** __[state reasons]__.

[Add if relevant]

__[6./5.]__ **That the defendant is willing to waive time for this purpose.**

[Continue]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: __[Signature of attorney]__

__[Typed name]__

__[Title if in public office]__

Attorney for __[name of defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

[The following is a declaration in support of a motion for continuance based on the need for time to secure a witness.]

**DECLARATION OF __[NAME OF DECLARANT]__ IN
SUPPORT OF MOTION FOR CONTINUANCE**

I, __[name of declarant]__ do hereby declare:

1. That I am __[e.g., the deputy district attorney assigned to the above-entitled case/the attorney for name of defendant]__.

2. That this case is presently set for __[specify proceeding, e.g., trial]__ **at** __[time]__ **on** __[date]__ **in Department** __[number]__.

3. That a continuance is required to secure __[name of witness]__ **as a witness in this case.**

4. That __[name of witness]__ **of** __[address of witness]__ **is a necessary witness for the** __[defense/prosecution]__ **in this case, in that** __[he/she]__ **would testify to the following facts:** __[state general substance of the proposed testimony]__.

5. That this proposed testimony is material to guilt or innocence in that this testimony is the only way to __[*state the effect of the proposed testimony on the case*]__.

6. That the facts contained in the proposed testimony cannot be proven by any other available evidence.

7. That __[*state efforts to secure attendance of witness*]__.

8. That __[*name of witness*]__ **will be available to testify on** __[*date*]__.

9. That this motion was not filed two court days before the __[*specify proceeding, e.g., trial*]__, **as required by Penal Code section 1050(b), because** __[*state reasons*]__.

[*Add if relevant*]

10. That the defendant is willing to waive time for this purpose.

[*Continue*]

__[*10./11*]__. **That I have notified the** __[*defense/prosecution*]__ **witnesses of this motion, the date of the hearing on this motion, and of their right to be heard by the Court, as required by Penal Code section 1050(b).**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[*Signature of attorney*]__

__[*Typed name*]__

__[*Title if in public office*]__

Attorney for __[*name of defendant*]__

Comment: A declaration or affidavit in support of a continuance motion must be attached to the motion. Pen C §1050(b). Counsel should include in the declaration or affidavit the minimum length of time needed for a continuance to give some guidance to the court and to allow counsel to develop a factual record to support the time necessary for the continuance. See *People v Weston* (1981) 114 CA3d 764, 777. The declaration must be made under penalty of perjury; it should not be made on information and belief. See *Brown v Superior Court* (1987) 189 CA3d 260, 265.

On a showing of good cause, the court may allow a continuance motion that does not comply with the notice requirements of Pen C §1050(b). Pen C §1050(c).

The motion must be filed and served at least *two court days* before the hearing to be continued. Pen C §1050(b). In computing the time, exclude the first day and include the last. *People v Harvey* (1987) 193 CA3d 767. A party is not deemed served until he or she actually has received a copy of the continuance motion, unless timely notice is waived. Pen C §1050(b). An attorney with a conflict in the scheduling of a court hearing must notify the calendar clerk of each court involved which hearing was set first. Notice must be in writing and within two court days after the attorney learns of the conflict. Pen C §1050(b). Failure to comply with the requirements of Pen C §1050(b) can result in sanctions: a fine of up to \$1000 and a disciplinary report to the State Bar. Pen C §§1050(b)–(c), 1050.5.

If a party seeking a continuance does not comply with the notice requirements, the trial court must first determine whether there is good cause for failure to comply with those requirements. If there is no good cause, the court must deny the motion; if there is good cause for failure to comply, the court must then decide whether there is good cause for granting a continuance. *Mendez v Superior Court* (2008) 162 CA4th 827; *People v Harvey* (1987) 193 CA3d 767.

Regardless of who moves for a continuance, the defense is responsible for notifying defense witnesses and the prosecution is responsible for notifying prosecution witnesses of the motion, of the hearing date, and of the witness's right to be heard. Pen C §1050(b).

Cross-Reference: For discussion of motions for continuance, see Crim Law, chap 20.

21

Disqualification of Judge

I. OVERVIEW

A. Peremptory Challenge §21.1

I. OVERVIEW

§21.1 A. Peremptory Challenge

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

I, __[name of declarant]__, declare:

1. I am __[e.g., the defendant/the prosecutor/the attorney for name of defendant]__ in this case.

2. The Honorable __[name of judge]__, the judge to whom this case is assigned, is prejudiced against __[name]__ or the interests of __[name]__, so that __[the defense/the prosecution]__ cannot, or believes that it cannot, have a fair and impartial __[trial/hearing]__ before this judge.

WHEREFORE it is requested that the Honorable __[name of judge]__ be disqualified under CCP §170.6 from __[trying/hearing]__ any matter in this case and that this Court issue an order reassigning this case to a different judge for further proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[Signature of declarant]__

__[Typed name]__

__[Title of declarant if in public office]__

Comment: The trial court may have its own standard form, which should be used. This form is usually filed in court, and a copy given at that time to opposing counsel. Special care must be taken to ensure that the form is filed in a timely manner. When a case is assigned in open court to a particular department, the challenge should be made and the form should be filed at the time of the assignment.

Prejudice may be established by an oral or written motion without prior notice, supported by an affidavit or declaration under penalty of perjury, or an oral statement under oath. When directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion must be made to the assigned judge or to the presiding judge within 10 days after notice of the all purpose assignment or, if the party has not yet appeared in the action, then within 10 days after the appearance. CCP §170.6(a)(2).

Cross-Reference: For discussion of challenges to judges, see California Criminal Law Procedure and Practice, chap 21 (Cal CEB).



Lineups and Identification

I. OVERVIEW

- A. Lineup Characteristics Chart §22.1
- B. Witness Identification Sheet §22.2
- C. Notice of Motion and Motion for Lineup (*Evans* Motion) §22.3
- D. Motion to Suppress Eyewitness Identification §22.4
- E. Prosecution Request for Lineup §22.5

I. OVERVIEW

§22.1

A. Lineup Characteristics Chart

Lineup No.:	1	2	3	4	5	6	7	8
Sex:								
Height:								
Weight:								
Age:								
Build:								
Hair color/ style:								
Eyes:								
Complexion:								
Glasses/ Contacts:								
If glasses, style:								
Jewelry:								
Disability:								
Voice/Accent:								
Ethnicity:								

Lineup No.:	1	2	3	4	5	6	7	8
Facial hair:								
Scars:								
Nose:								
Teeth:								
Accent:								
Clothing condition:								
Fit of clothes:								
Shoes:								
Socks:								
Hat:								
Pants:								
Dress:								
Skirt:								
Jacket:								
Coat:								
Sneakers:								
Shoelaces:								
Boots:								
Jewelry:								
Weapon:								
Tattoos:								
Special characteristics:								
Unusual features:								
Performance during lineup:								

§22.2 B. Witness Identification Sheet

Name of Witness: _____

Sex: _____ Age: _____ Height: _____ Ethnicity: _____

Weight: _____ Hair Color: _____ Eye Color: _____

Clothing: _____

Glasses/contacts: _____

Hearing aid: _____

Disability: _____

With friend: _____

Made mark on paper: _____

Who did witness ID: _____

Communicated with someone before making ID: _____

§22.3 C. Notice of Motion and Motion for Lineup (Evans Motion)

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will argue and does hereby move that the Court order the District Attorney of _____ County and the __[name of police department]__ Police Department to conduct a physical lineup in which the defendant will be exhibited to the complaining witness in this case, __[name of complaining witness]__, and to __[witness/witnesses]__, __[name(s) of other witness(es)]__.

This motion is made on the grounds that evidence of eyewitness identification is a material issue in this case and there exists a reasonable likelihood of mistaken identification, which a lineup would tend to resolve. This motion will be based on the attached supporting memorandum, __[the attached declaration(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__**Attorney for** __[name of
defendant]__

*[The supporting memorandum should start on a new page.
Caption is unnecessary if attached to papers with caption
and first-page caption includes all parts of motion. See §1.9;
California Criminal Law Procedure and Practice §18.5 (Cal
CEB).]*

SUPPORTING MEMORANDUM

A DEFENDANT IS ENTITLED TO COMPEL THE PROSECUTION TO CONDUCT A PRETRIAL LINEUP UNDER THE CIRCUMSTANCES OF THIS CASE

In *Evans v Superior Court* (1974) 11 C3d 617, 625, the California Supreme Court held that “due process requires in an appropriate case that the accused, upon timely request ... be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate.” This ruling applies when identification is a material issue and mistaken identification is a reasonable likelihood. (See *Garcia v Superior Court* (1991) 1 CA4th 979, 987.) Defense counsel is entitled to be present at the lineup. (*People v Williams* (1971) 3 C3d 853, 856.)

__[Explain why identification is a material issue and mistaken identification a reasonable likelihood. Refer to attached declarations and/or exhibits that support your argument. If an eyewitness to the crime has not yet identified the defendant, state so. See *People v Harmon* (1989) 215 CA3d 552]__.

Date: _____

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender
office]__**Attorney for** __[name of
defendant]__

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

DECLARATION IN SUPPORT OF MOTION FOR ORDER TO CONDUCT LINEUP

I, __[name of declarant]__, declare as follows:

1. I __[am an attorney with the _____ County Public Defender's Office and represent the defendant/am the attorney appointed to represent the defendant/represent the defendant]__.

2. I have reviewed all of the police reports made available to me in this case, including the statements of complaining witness, __[name]__, and witness, __[name]__. __[A copy of __[name of police department]__ Police Department Report No. __[number]__ is attached as Exhibit A.]__

[Use if defendant will not otherwise be in a lineup before the preliminary hearing.]

3. At the preliminary hearing and at trial, witnesses __[names of witnesses]__ will be asked if they can identify the defendant, who will be seated next to me at the counsel table. The inherent suggestiveness in such a proceeding may be remedied by a properly conducted physical lineup before the preliminary hearing.

[Use if sheriff's department and police department will both be involved in the lineup.]

4. As defendant is currently confined at __[place of confinement]__, it is submitted that the lineup should be conducted by the __[name of police department]__ Police Department in conjunction with the __[name of sheriff's department]__ County Sheriff's Department.

[Continue]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of declarant]____

_____[Typed name]____

_____[Title of declarant if in public office]____

[A proposed order should begin on a new page. Even if filed as part of the motion, it should have a separate caption. See, e.g., Los Angeles Ct R 8.6(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____**

**PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff
vs
__[Name]__,
Defendant.**

**Dept. __[number]__
No. __[case number]__
[PROPOSED] ORDER TO
CONDUCT LINEUP**

**TO __[NAME OF SHERIFF]__, SHERIFF OF _____ COUNTY, AND
__[NAME OF POLICE CHIEF]__, POLICE CHIEF OF __[NAME OF
POLICE DEPARTMENT]__ POLICE DEPARTMENT, AND __[NAME OF
DEFENDANT]__:**

This matter came on regularly for hearing on the __[leave underlined blank space for judge to fill in date]__ day of __[leave underlined blank space for judge to fill in month]__, __[year]__, pursuant to a notice of motion and motion filed herein by the defendant. Counsel for the defendant and for the People have both appeared. Counsel for the defendant moved in open court for an order compelling a lineup.

The Court having read the memorandum and declaration submitted in support of the motion, and having heard the arguments of counsel on the motion,

IT IS HEREBY ORDERED that:

1. __[Specify law enforcement agencies]__ are to conduct a lineup for the defendant. The lineup shall contain a total of at least six persons, including the defendant. All of these persons shall be of the same general physical appearance and dress as the defendant. The participants in the lineup shall be selected from the population of inmates.

2. Defense counsel shall be notified of the time and place of the lineup at least twenty-four hours in advance of said lineup.

3. Defense counsel shall be given a reasonable opportunity at the location of the lineup to interview the witnesses before and after the lineup is conducted.

4. Defense counsel shall be given a reasonable opportunity to preview the proposed lineup.

5. The witnesses are not to be shown any photographs prior to the lineup, regardless of whether they have viewed photographs previously.

6. All witnesses attending the lineup shall be given a standard witness card for their responses to the lineup.

7. Defense counsel shall be permitted to be present and permitted to overhear any conversations of the witnesses that involve the identification of the perpetrator of the crime of which defendant is accused, whether such conversation is held during or after said lineup.

[Either]

8. The defendant is ordered to make __[himself/herself]__ available at the time and place designated by __[name of law enforcement agency that will hold lineup]__ for the lineup and is ordered to participate in the lineup and to follow the directions of the officials conducting the lineup.

[Or]

8. The defendant is presently not in custody. The __[Sheriff]__ __[Police Chief]__ is directed to contact defendant's attorney, __[name of attorney]__, at __[phone number]__, who will arrange for the defendant to appear for the lineup and/or any pre-lineup activities.

[Continue]

9. The __[name of law enforcement agency conducting lineup]__ is directed to allow the defendant, __[name]__, to enter the jail facilities for the purpose of the lineup and any activity necessary for the preparation therefore. Immediately after the lineup or after any activity in preparation therefore, defendant shall be immediately allowed to exit and be released from the jail.

Date: _____
 _____[Signature of magistrate]____
 _____[Typed name]____
 _____[Title]____

Comment: In an appropriate case, due process requires that the defendant be afforded a pretrial lineup on a timely request. *Evans v Superior Court* (1974) 11 C3d 617, 625. When identification is a material issue and mistaken identification is a reasonable likelihood, the defendant is entitled to a lineup. See *Garcia v Superior Court* (1991) 1 CA4th 979, 987.

Cross-Reference: See discussion of defense lineups in Crim Law §22.17.

§22.4 D. Motion to Suppress Eyewitness Identification

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order the suppression of any in-court eyewitness identifications of the defendant made by __[names of witnesses]__ as being the product of unduly suggestive law enforcement procedures.

This motion will be based on the testimony of __[state names of witnesses to be called; give badge numbers, when possible, of law enforcement officers]__, **as well as any other** __[name of law enforcement agency police officers/sheriff's deputies]__ **conducting photo lineups, physical lineups, or showups at which the defendant was identified by the above witnesses.**

Date: _____
 Respectfully submitted,
 _____[Signature of attorney]____
 _____[Typed name]____
 _____[Title if in public defender office]____
Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

THE IDENTIFICATION PROCEDURE IN THIS CASE WAS TAINTED.

__ [Describe the identification procedure involved. Attach as exhibits (see §1.25) any evidence relevant to this description, e.g., copies of photos of those involved in physical lineup. Explain why it was tainted, with support of relevant case law. See, e.g., People v Wash (1993) 6 CA4th 215, 244; People v Contreras (1993) 17 CA4th 813, 819.] __

**THE __ [WITNESS IDENTIFICATION(S)] __ OF THE DEFENDANT
__ [HAS/HAVE] __ BEEN TAINTED BY THE IDENTIFICATION PROCEDURE.**

Once the trial court finds that an identification procedure was tainted, the burden shifts to the prosecution to prove by clear and convincing evidence that the in-court identification was based on observations at the scene of the crime, and was not tainted by the identification procedure. (*People v Martin* (1970) 2 C3d 822.)

__ [Describe why the witness's observations at the scene of the crime were not the basis for the identification. For example, in a police report, or in response to your questions at the preliminary hearing, the witness may have said that his or her view of the perpetrator at the time of the crime was brief (one or two seconds); that the witness was not wearing his or her glasses; that it was dark; that the perpetrator was far away; and so on. If the witness was unable to identify the defendant at any proceeding, or identified the wrong person, point that out. If there are discrepancies between the defendant's appearance and the description of the perpetrator given by the witness right after the crime, state that. Attach as exhibits the documents that support the statements in this section] __.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Comment: This motion is usually made at trial because pretrial evidentiary rulings are not binding on the trial court absent an agreement. See *People v Leighter* (1971) 15 CA3d 389, 394, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77. Counsel must subpoena the witnesses needed to testify at the hearing on the motion. When the identity of the witnesses is not apparent from police reports, the preliminary hearing, and so forth, the names and addresses of relevant witnesses can be obtained from the district attorney. When law enforcement officers are involved, more stringent time requirements are involved for subpoenaing them. See Crim Law §4.30.

The documents that support the allegations that the identification was tainted, *e.g.*, a police report or selected pages from the preliminary hearing transcript, should be attached to the motion as exhibits. See discussion of exhibits in §1.25.

The prosecution may argue that the court should wait until later in the case before hearing or ruling on the motion so that it has more information on which to base a decision; there is no taint, and, that if the pretrial identification procedure was tainted, an independent source exists for the witness's in-court identification.

If evidence concerning the identification was introduced at the preliminary hearing, that evidence may be attacked by way of a Pen C §995 motion. See §13.1. For discussion of §995 motions, see Crim Law, chap 13.

Cross-Reference: For discussion of timing and content of motions challenging eyewitness identification, see Crim Law §§22.21–22.31.

§22.5 E. Prosecution Request for Lineup

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

**TO THE ABOVE-ENTITLED COURT, __[NAME OF SUSPECT]__, AND
__[NAME OF DEFENSE ATTORNEY]__:**

1. An affidavit is attached showing the factual circumstances that support a finding of probable cause that the suspect, __[name]__, committed a crime and that a lineup is necessary.

2. Probable cause exists for the suspect's arrest, but the decision has been made not to subject the suspect to the inconvenience and expense of an arrest unless additional evidence is obtained.

3. Therefore, I request an order directing __[name of suspect]__ to surrender __[himself/herself]__ into the custody of the __[name of police agency]__, __[address]__, for the limited purpose of participation in a lineup, with the understanding that __[he/she]__ will be released immediately on completion of the lineup. I further request an order directing the __[name of police agency]__ to conduct such a lineup and to release __[name]__ immediately on completion of the lineup.

Date: _____

_____[Name of District Attorney]__

District Attorney

_____[Signature of deputy district attorney]__

_____[Typed name]__

Deputy District Attorney

[Each affidavit attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

AFFIDAVIT IN SUPPORT OF REQUEST FOR LINEUP

1. Your affiant, __[name of affiant]__ is a peace officer for the __[name of law enforcement agency]__ and is the investigator assigned to a matter involving the commission of __[specify types of crime, e.g., robbery]__.

2. Attached to this affidavit and request are police reports that set out facts that support a finding of probable cause to believe __[name of suspect]__ is the perpetrator.

3. It is necessary to conduct a formal lineup with the suspect to properly investigate this matter.

4. __[Name]__ has been advised of __[his/her]__ right to counsel and __[has been provided with counsel/has waived the right to counsel]__.

5. I therefore request an order directing __[name]__ to cooperate in a formal lineup and directing law enforcement officers to use reasonable force to compel __[his/her]__ participation if __[he/she]__ refuses to cooperate.

Date: _____ *__[Signature of notary or magistrate]__*
__[Typed name]__

Subscribed and sworn before me

Date: _____ *__[Signature of notary or magistrate]__*
__[Typed name]__

[Begin the following on a new page.]

**IN THE SUPERIOR COURT OF THE _____ JUDICIAL
DISTRICT OF THE STATE OF CALIFORNIA COUNTY OF**

**IN THE MATTER OF __[NAME OF SUSPECT]__ ORDER
FOR LINEUP**

TO __[NAME OF POLICE AGENCY]__ AND __[NAME OF SUSPECT]__:

Good cause having been shown by the accompanying request and affidavit, the __[name of police agency]__ is ordered to conduct a lineup in which __[name of suspect]__ will be a participant. Such lineup is to be conducted in accordance with the laws of this state and the rules of the __[name of police agency]__. The lineup is to be conducted on __[date and time specified by police agency holding the lineup]__ at __[location]__.

[Either]

The __[name of police agency]__ is ordered to take __[name]__ into custody for the period of time necessary to conduct the lineup and to release __[him/her]__ from custody immediately on completion of the lineup.

[Or]

__[Name]__ is ordered to appear at __[location of relevant law enforcement agency]__ at __[time]__ for the purpose of allowing law

enforcement officers to photograph __[him/her]__ and evaluate __[his/her]__ general appearance so that suitable coparticipants in the lineup may be selected from the jail population. __[Name]__ is ordered to surrender __[himself/herself]__ into custody at __[location of lineup]__ for __[specify number of hours needed by law enforcement]__ so that __[he/she]__ may be prepared for the lineup.

[Continue]

__[Name]__ is ordered to cooperate in all lineup procedures and to obey all rules of the jail and all directions of law enforcement officers relevant to the lineup.

Date: _____

_____[Signature of magistrate]____

_____[Typed name]____

Comment: A deputy district attorney or district attorney investigator usually brings these papers to a magistrate in chambers for signature. This is a request, not a motion, because the suspect is not yet charged. It is common to include an affidavit and order along with the request. No filing and service is necessary, because the defendant is not yet charged.

Under the Sixth Amendment to the United States Constitution, a defendant has a right to have counsel present at a live lineup held after criminal proceedings have commenced. *People v Yokely* (2010) 183 CA4th 1264. While under the California Constitution, defendants who will be placed in a lineup before having been charged have the right to counsel (*People v Bustamante* (1981) 30 C3d 88; *Raven v Deukmejian* (1990) 52 C3d 336, 354), the exclusionary rule set out in *Bustamante* was abrogated by Cal Const art I, §28(f)(2), as there is no corresponding right under the federal Constitution. *People v Cook* (2007) 40 C4th 1334, 1353. If the defendant waives counsel, the waiver should be in writing.

If the defendant is in custody and refuses to appear in a lineup, the request may be adapted into a motion.

Cross-Reference: On lineups generally, see Crim Law, chap 22.

Confessions and Admissions

I. OVERVIEW

- A. Invocation of Right to Counsel §23.1
- B. Defense Motion to Suppress Statement as Product of Fourth Amendment Violation §23.2
- C. Defense Motion to Exclude Statement §23.3

I. OVERVIEW

§23.1 A. Invocation of Right to Counsel

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

The above-named defendant hereby invokes __[his/her]__ right to counsel, including the right to have counsel present, the right to remain silent, and the privilege against self-incrimination, as to this case and any other matter, whether or not an accusatory pleading has been filed therein, as provided under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. This invocation includes, but is not limited to, all of the rights available under *Miranda v Arizona* (1966) 384 US 436, 86 S Ct 1602, and *Edwards v Arizona* (1981) 451 US 477, 101 S Ct 1880, including, but not limited to, the Fifth and Sixth Amendment right to counsel.

Date: _____

Respectfully submitted,
 __[Signature of attorney]__
 __[Typed name]__
 __[Title if in public defender office]__
 Attorney for __[name of defendant]__

Comment: This form is intended to address the holding of *McNeil v Wisconsin* (1991) 501 US 171, 111 S Ct 2204, to the effect that, although a defendant has counsel in a particular case, that representation does not bar police from interrogating the defendant as to other crimes, without notice to or the presence of counsel, as long as a *Miranda* waiver is obtained. See dissenting opinion by Justice Stevens, 501 US at 183. Filing this form puts the police on notice that the defendant wishes to be and is represented in all criminal cases, requiring the police to contact counsel before questioning the defendant.

The form should be filed in court, with an oral statement for the record, at the first possible appearance. If the defendant is unable to sign for any reason, counsel should sign on the defendant's behalf. When the defendant is able to sign, another form should be filed, with an oral statement for the record, at the next opportunity.

NOTE► If counsel believes questioning on other charges, or by other law enforcement agencies, is likely, counsel should also serve copies of this invocation on all local police agencies so that they have actual notice.

Cross-Reference: See discussion of waiver in California Criminal Law Procedure and Practice §23.44 (Cal CEB).

§23.2 B. Defense Motion to Suppress Statement as Product of Fourth Amendment Violation

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY:

PLEASE TAKE NOTICE that, at the time of the Penal Code section 1538.5 hearing now set for __[date]__, at __[time]__, defendant, __[name]__, will move to suppress defendant's statement under Penal Code section 1538.5 because it was a product of an illegal search.

This motion is based on violation of defendant's reasonable expectation of privacy, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and on the following particular grounds: __[State grounds]__.

This motion will be based on the attached supporting memorandum, __[the attached declaration, __[the transcript of the preliminary hearing (in the court file; the defendant hereby requests that the court take judicial notice of the contents of this transcript),]__ a supplemental memorandum of points and authorities, to be filed after the hearing on this motion]__, all papers filed and records in this action, evidence presented at the hearing on this motion, and any argument at that hearing.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

__[Summarize your argument in a few sentences.]__

SUMMARY OF FACTS

__[Briefly summarize the facts relative to this motion.]__

ARGUMENT

Penal Code section 1538.5 is the proper vehicle for excluding defendant's statement.

The procedures provided by Penal Code section 1538.5 are the proper way of moving to suppress statements obtained in violation of the protections of the Fourth and Fourteenth Amendments to the United States Constitution. (*People v Takencareof* (1981) 119 CA3d 492, 496, disapproved on other grounds in *People v Towne* (2008) 44

C4th 63; see also *People v Johnson* (1969) 70 C2d 541, 545, overruled on other grounds in *People v De Vaughn* (1977) 18 C3d 889, 899 n8.)

[Continue with appropriate headings and arguments. Some examples follow.]

DEFENDANT'S STATEMENT WAS THE RESULT OF AN ILLEGAL SEARCH

Statements obtained as the result of an illegal search or seizure must be suppressed as "'fruit' of official illegality." (*Wong Sun v U.S.* (1963) 371 US 471, 485, 83 S Ct 407.) __ *[Describe why the search in your case was illegal and why the defendant's statement was a result of that illegal search.]* __

DEFENDANT'S STATEMENT WAS THE RESULT OF AN ILLEGAL
__ *[DETENTION/ARREST]* __

Statements obtained as the result of an illegal detention or arrest must be suppressed. (*Taylor v Alabama* (1982) 457 US 687, 102 S Ct 2664; *Dunaway v New York* (1979) 442 US 200, 99 S Ct 2248; *Brown v Illinois* (1975) 422 US 590, 95 S Ct 2254.) __ *[Describe why the detention or arrest was illegal and why the defendant's statement was a result of that illegal detention or arrest.]* __

DEFENDANT'S STATEMENT WAS OBTAINED BY TELLING DEFENDANT OF EVIDENCE THAT HAD BEEN ILLEGALLY SEIZED

A statement that is obtained by informing the defendant of evidence obtained in violation of the Fourth Amendment must be suppressed. (*People v Johnson* (1969) 70 C2d 541, overruled on other grounds in *People v De Vaughn* (1977) 18 C3d 889, 899 n8.) __ *[Describe what evidence was used to get the defendant to make a statement, why it should be considered to have been illegally seized, and why it was what caused the defendant to make a statement.]* __

THE CAUSAL CONNECTION BETWEEN THE __ *[DESCRIBE THE ILLEGALITY, E.G., THE ILLEGAL DETENTION]* __ **AND DEFENDANT'S STATEMENT WAS NOT ATTENUATED BY READING DEFENDANT**
__ *[HIS/HER]* __ **MIRANDA RIGHTS.**

Simply advising a defendant of his or her *Miranda* rights is not sufficient per se to vitiate the taint of a Fourth Amendment violation:

In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it is “sufficiently an act of free will to purge the primary taint.”

But the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. (*Brown v Illinois* (1975) 422 US 590, 602, 95 S Ct 2254; emphasis in original.)

See also *Taylor v Alabama* (1982) 457 US 687, 102 S Ct 2664; *Dunaway v New York* (1979) 442 US 200, 99 S Ct 2248.

CONCLUSION

Defendant moves to suppress __[his/her]__ statement as the fruit of __[describe the Fourth Amendment violation]__.

Defendant requests leave to file a supplemental memorandum after the hearing on the motion, because evidence may be adduced at the hearing that will require further briefing by the parties.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

Comment: A motion to exclude, or an objection to the admission of, a statement on the ground that it violates the Fifth Amendment may be made in limine or at trial. See, e.g., *People v Dykes* (2009) 46 C4th 731, 748 (motion in limine). When, however, the ground for suppressing a confession or admission is that it is the fruit of an unlawful search or seizure, the motion is alleging a Fourth Amendment violation and the procedures set forth in Pen C §1538.5 are applicable. Failure to request suppression of a statement obtained in violation of the Fourth Amendment under §1538.5 (or in conjunction with the motion to suppress other evidence under §1538.5) waives the issue.

Cross-Reference: For further discussion, see Crim Law §§23.9–23.10. See also Crim Law, chap 16 on search and seizure generally.

§23.3 C. Defense Motion to Exclude Statement

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF _____:

PLEASE TAKE NOTICE that __ *[on particular date if motion is to be heard before trial/whenever the matter is assigned for trial]* __, **defendant**, __ *[name]* __, **will make a motion that the Court order the suppression as evidence of defendant's statement** __ *[specify statement to be suppressed, e.g., made to the police on November 30, 2004]* __.

This motion will be made on the ground(s) that the statement was taken in violation of defendant's constitutional right __ *[specify right, e.g., to counsel, to remain silent, and to due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution/to privileged communications under one of the statutory privileges]* __.

This motion will be based on this notice, the attached supporting memorandum, __ *[the attached exhibits,]* __ all papers filed and records in this action, and on such oral and documentary evidence and argument as may be presented at the hearing on this motion.

[Use the following if requesting witnesses.]

The witnesses needed for this hearing will be: __ *[give name(s) of law enforcement witness(es)]* __. **The defense will rely on the prosecution to arrange for the presence of these witnesses unless otherwise advised by the prosecutor.**

[Continue]

Date: _____

Respectfully submitted,
__ *[Signature of attorney]* __
__ *[Typed name]* __
__ *[Title if in public defender office]* __
Attorney for __ *[name of defendant]* __

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

When the existence of a preliminary fact concerning the admissibility of a statement of the defendant is disputed, the trial court shall hear and determine the question out of the presence and hearing of the jury on the request of any party. (Evidence Code section 402.) The preliminary fact to be determined in this case is __[state what it is, e.g., that the Miranda warnings were required but were not given]__.

[The arguments below are examples of those you might wish to make. Choose those that apply to your case and add any others that fit the facts.]

THE DEFENDANT'S STATEMENT MUST BE EXCLUDED BECAUSE __[HE/SHE]__ WAS IN CUSTODY, QUESTIONED BY THE POLICE, AND NOT TOLD OF __[HIS/HER]__ MIRANDA RIGHTS

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.... Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda v Arizona* (1966) 384 US 436, 444, 86 S Ct 1602.)

In this case, __[describe the facts concerning the statement, tell why Miranda was required to be given before the defendant was questioned by the police, and attach exhibits or declarations that support your factual assertions]___. Defendant's statement to the police on __[date]__, therefore, must be suppressed.

POLICE SHOULD HAVE STOPPED INTERROGATING DEFENDANT WHEN __[HE/SHE]__ ASSERTED __[HIS/HER]__ RIGHT TO COUNSEL; DEFENDANT'S STATEMENT WAS THEREFORE OBTAINED IN VIOLATION OF MIRANDA

Once a person in custody indicates to the police ... in any manner and at any stage of the process that he wishes to consult with

an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (*Miranda v Arizona* (1966) 384 US 436, 444, 86 S Ct 1602.)

__ [Describe what constituted the defendant's invocation of Miranda and integrate discussion of cases with similar fact patterns. Refer to declarations or exhibits attached to the motion that support your factual assertions.] __

DEFENDANT INVOKED __ [HIS/HER] __ RIGHT TO COUNSEL AND DID NOT THEREAFTER VOLUNTARILY INITIATE CONVERSATION WITH LAW ENFORCEMENT; DEFENDANT'S STATEMENT WAS THEREFORE OBTAINED IN VIOLATION OF MIRANDA

[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused ... , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. (*Edwards v Arizona* (1981) 451 US 477, 484, 101 S Ct 1880.)

__ [Describe how defendant invoked the right to counsel and why his or her later statements were not volunteered, integrating discussion of cases with similar fact patterns. Refer to exhibits or declarations attached to the motion that support your factual assertions.] __

DEFENDANT DID NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE __ [HIS/HER] __ MIRANDA RIGHTS

First, the relinquishment of the [defendant's Fifth Amendment] right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the

“totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (*Moran v Burbine* (1986) 475 US 412, 421, 106 S Ct 1135.)

[T]he constitutional inquiry is not whether the conduct of state officials in obtaining the confession was shocking, but whether the confession was “free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any exertion of any improper influence.” (*Malloy v Hogan* (1964) 378 US 1, 17, 84 S Ct 1489.)

*__ [Describe facts that show defendant cannot be considered to have waived his or her *Miranda* rights, integrating discussion of cases with similar fact patterns. Refer to exhibits or declarations attached to the motion that support your factual assertions.] __*

DEFENDANT’S STATEMENT MUST BE SUPPRESSED BECAUSE IT WAS DELIBERATELY ELICITED AFTER THE RIGHT TO COUNSEL HAD ATTACHED, IN VIOLATION OF MASSIAH

After the right to counsel has attached, whether the defendant is in custody or not, statements deliberately elicited by government agents without the protection afforded by the presence of counsel are inadmissible. (*Patterson v Illinois* (1988) 487 US 285, 108 S Ct 2389; *Massiah v U.S.* (1964) 377 US 201, 84 S Ct 1199.) *__ [Describe facts concerning when and why right to counsel attached, integrating discussion of cases with similar fact patterns. Refer to exhibits or declarations attached to the motion that support your factual assertions.] __*

DEFENDANT’S STATEMENTS MUST BE SUPPRESSED BECAUSE THEY WERE COERCED

Involuntary or coerced admissions are inadmissible at trial (*Lego v Twomey* (1972) 404 US 477, 478, 92 S Ct 619) because their admission violates defendant’s right to due process under the Fourteenth Amendment (*Jackson v Denno* (1964) 378 US 368, 385, 84 S Ct 1774). A confession is involuntary if it is not “the product of a rational intellect and a free will.” (*Townsend v Sain* (1963) 372 US 293, 307, 83 S Ct 745, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 5, 112 S Ct 1715; see also *Blackburn v Alabama* (1960) 361 US 199, 208, 80 S Ct 274.) A necessary predicate to finding a confession involuntary is that it was produced through “coercive police activity.” (*Colorado v Connelly* (1986) 479 US 157, 167, 107 S Ct 515.) Coercive

police activity can be the result of either “physical intimidation or psychological pressure.” (*Townsend*, 372 US at 307; see also *Blackburn*, 361 US at 206 [“[C]oercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition.”]) Whether a confession is involuntary must be analyzed within the “totality of the circumstances.” (*Withrow v Williams* (1993) 507 US 680, 693, 113 S Ct 1745.) The factors to be considered include the degree of police coercion; the length, location, and continuity of the interrogation; and the defendant’s maturity, education, physical condition, mental health, and age. (See 507 US at 693; *Yarborough v Alvarado* (2004) 541 US 652, 668, 124 S Ct 2140.)

[Describe facts concerning how the defendant's statements were coerced by police tactics. Refer to exhibits or declarations attached to the motion that support your factual assertions.]

CONCLUSION

Defendant moves to suppress __[his/her]__ statement, made on __[date]__ for the reasons given above.

Defendant requests leave to file a supplemental supporting memorandum after the hearing on the motion because evidence may be adduced at the hearing that will require further briefing by the parties.

Date: _____

Respectfully submitted,

__[Signature of attorney]__

__[Typed name]__

__[Title if in public defender office]__

Attorney for __[name of defendant]__

Comment: The statements sought to be suppressed should be identified with specificity, although the motion may need to be expanded if the hearing produces other evidence of statements. There may be alternative grounds for the motion; each should be stated with specificity. The form’s sample grounds for objection are some of the most common. Any declarations and any exhibits, such as police reports or preliminary hearing transcript pages, that are required to support the factual assertions made in your supporting memorandum should be attached to the motion. In almost

all instances, the primary witnesses will be police officers. In many jurisdictions, if given adequate notice, the prosecutor will arrange for the presence of those witnesses.

Motions in limine must specify the evidence to be admitted or excluded, and the grounds. See Evid C §§402–405. In limine motions are commonly made in chambers before trial begins. Rulings on motions made before trial, however, are not binding on the trial court, unless a statutory exception applies, *e.g.*, Pen C §1538.5. See *People v Leighter* (1971) 15 CA3d 389, 394, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77. Any objection must be renewed at the time the evidence is offered during trial or the objection is waived, with several exceptions. *People v Morris* (1991) 53 C3d 152, 188, overruled on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1. The exceptions are:

- A stipulation by the defense and prosecution that no further objection is required to preserve the objection (*People v Morris, supra*);
- An objection that is specifically directed to an identifiable body of evidence and advanced when the court can see that evidence in context (*People v Morris, supra*); and
- An objection concerning evidence that might impinge on the defendant's constitutional or statutory rights, *e.g.*, an involuntary statement (see *People v Cahill* (1994) 22 CA4th 296, 309 n3).

The tactical considerations in deciding whether to make this motion before trial, or in the trial court, are discussed in Crim Law §23.12.

Some of the most common procedural attacks on motions to suppress are:

- Failure to comply with California Rules of Court or local rules concerning timing, content, and notice of motion;
- No standing; and
- Defense failed to subpoena witnesses for hearing, so no basis for court ruling.

Even if the defense motion is successful, the prosecution may still use a defendant's voluntary statement for impeachment if it was excluded because of *Miranda* error (*People v May* (1988) 44 C3d 309), Fourth Amendment error (*People v Moore* (1988) 201 CA3d 877), or Sixth Amendment error (*Kansas v Ventris* (2009) 556 US 586, 593, 129 S Ct 1841). Defense counsel also may "open the door" to admission of an otherwise inadmissible statement. See *People v Rich* (1988) 45 C3d 1036. In

addition, a defendant's statement to mental health professionals during a court-ordered competency examination is inadmissible at trial for purposes of impeachment. *People v Pokovich* (2006) 39 C4th 1240, 1252. Coerced statements must be excluded from the trial entirely. *James v Illinois* (1990) 493 US 307, 314, 110 S Ct 648.

Cross-Reference: On confessions and admissions generally, see Crim Law, chap 23.

Prior Convictions and Uncharged Misconduct

I. OVERVIEW

A. Defense Motion to Strike Prior Conviction §24.1

B. Motion to Preclude Impeachment With Prior Conviction §24.2

I. OVERVIEW

§24.1 A. Defense Motion to Strike Prior Conviction

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _____ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on __[date]__, in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the defendant, __[name]__, will move that the Court order the following alleged prior conviction of defendant to be stricken: __[number seriatim]__ on __[date of conviction]__ in _____ County for __[specify offense]__.

This motion will be made on the ground that __[give ground, e.g., the prior conviction was constitutionally invalid in that the defendant did not freely, voluntarily, and intelligently waive the constitutional right to counsel, the privilege against compulsory self-incrimination, the right to jury trial, and the right to confront accusers]__.

This motion will be based on this notice, the attached supporting memorandum, __[the attached specify attached documents, e.g., transcript of the plea, the minute order on plea, the written plea form, the dec-

laration of the defendant] __, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

Respectfully submitted,

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public defender office] __

Attorney for __ [name of defendant] __

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[The following argument is an example.]

A DEFENDANT MUST BE INFORMED ON THE RECORD OF HIS OR HER CONSTITUTIONAL RIGHTS BEFORE ENTERING A GUILTY PLEA

Defendants in misdemeanor and felony cases (see *Mills v Municipal Court* (1973) 10 C3d 288) must be informed on the record of the following constitutional rights before entering a valid plea of guilty: the right to counsel; the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront accusers. (*People v Howard* (1992) 1 C4th 1132; see *People v Sumstine* (1984) 36 C3d 909, 914; *Boykin v Alabama* (1969) 395 US 238, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 132.)

A VALID GUILTY PLEA MUST BE VOLUNTARY AND INTELLIGENT UNDER THE TOTALITY OF THE CIRCUMSTANCES

A prior conviction by guilty plea is not constitutionally valid unless the record affirmatively shows that it was voluntary and intelligent under the totality of the circumstances. (*People v Howard* (1992) 1 C4th 1132, 1175.)

A CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF A PRIOR CONVICTION CHARGED IN A PENDING CASE IS PROPERLY DECIDED BY THE TRIAL COURT IN WHICH THE CURRENT CASE IS PENDING

The court in which a case is pending that charges a prior conviction is the proper place to raise a challenge to the prior. *People v Sumstine, supra*.

When a defendant has raised the issue of the constitutional validity of a prior conviction, “the court shall, prior to trial, hold a hearing outside the presence of the jury in order to determine the constitutional validity of the charged prior or priors in issue.” (*People v Coffey* (1967) 67 C2d 204, 217.)

The trial court “shall strike from the accusatory pleading any prior conviction found to be constitutionally invalid.” (*People v Coffey, supra*.)

THE PRIOR CONVICTION MUST BE STRICKEN BECAUSE DEFENDANT’S GUILTY PLEA WAS NOT VOLUNTARY AND INTELLIGENT UNDER THE TOTALITY OF THE CIRCUMSTANCES

__ [Give the details of defendant’s plea: (1) date; (2) court; (3) charges; (4) rights given; (5) rights waived; (6) was defendant represented by counsel; (7) was there a written plea form (if so, attach a copy)] __; and __ [(8) was the advice and waiver reported (if so, attach a copy). If you have sent for the plea form and/or transcript, but have not received it yet, you may want to attach a declaration from the defendant. Give case law support for your argument, selecting cases with facts similar to those of your case.] __

CONCLUSION

For the above reasons, defendant requests that this court strike the prior conviction charged in the __ [complaint/information] __ in this case.

Date: _____

_____[Signature of attorney]____

_____[Typed name]____

_____[Title if in public defender
office]____**Attorney for** ____[name of
defendant]____

[Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

DECLARATION OF DEFENDANT IN SUPPORT OF MOTION TO STRIKE PRIOR CONVICTION

I, ____[name]____, am the defendant in the above-entitled action. On ____[date of conviction]____ in _____ County, I was convicted of ____[specify offense]____. At the time of my plea in the latter conviction, I did not know of my ____[specify right(s) in question, e.g., right to counsel, privilege against compulsory self-incrimination, right to jury trial, right to confront accusers]____. If I had known of ____[this right/these rights]____, I would not have pleaded guilty.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____[Signature of declarant]____

_____[Typed name]____

Comment: A motion to strike a prior conviction on constitutional grounds may be made at any time from the date of the plea to the pronouncement of judgment. The defendant bears the burden of proving the constitutional invalidity of the prior conviction by a preponderance of the evidence. *People v Curl* (2009) 46 C4th 339, 351; *Curl v Superior Court* (1990) 51 C3d 1292, 1296.

Content. The defendant cannot rely solely on a silent record to establish violation of the *Boykin-Tahl* rights. Even if the transcript of the plea to the prior shows no advisements, the defendant must affirmatively allege that he or she was not aware of the rights. The defendant must also allege that he or she would not have pleaded guilty if aware of the rights. *People v Cooper* (1992) 7 CA4th 593, 597. The defendant can meet this burden by testifying, or by producing an affidavit or declaration signed under penalty of perjury about the defect. If an affidavit or declaration is used, the defen-

dant must still be available at the hearing for cross-examination. Alternatively, trial counsel on the prior may be asked to submit a declaration.

NOTE► The defendant cannot attack the validity of a prior used to enhance a sentence on the ground of ineffective assistance of counsel, as distinguished from violation of the right to be represented by

counsel, in the prior proceeding. *Custis v U.S.* (1994) 511 US 485, 114 S Ct 1732; *Garcia v Superior Court* (1997) 14 C4th 953.

Exhibits. A certified copy of the reporter's transcript of the plea or, if none is available, a copy of the minute order concerning the plea, and a copy of the written waiver form, if one was executed, should be attached to the motion as exhibits. See §1.25 on exhibits.

Challenge to certain Vehicle Code priors. When the prior conviction is under Veh C §§14601, 14601.1, 14601.2, 23152, 23153, and 23103 as specified in Veh C §23103.5, the motion to strike is controlled by Veh C §41403. To challenge these priors on constitutional grounds, the defendant must state in writing, and with specificity, how he or she was deprived of his or her constitutional rights. This statement is filed with the clerk of the court. Service must be made on the prosecution in the current action and on the court that rendered the prior judgment at least 5 court days before the hearing on the motion. Veh C §41403(a). If the defense fails to comply with the above notice requirement and does not show good cause for the failure to comply, the court must hear the motion at the time of sentencing. Veh C §41403(c).

Opposing the motion. The prosecution may file an opposition to the defense motion. Opposition is particularly important when it appears evidence exists to rebut the defendant's contention that the prior is constitutionally infirm. See *People v Howard* (1992) 1 C4th 1132, 1175; *People v Cooper* (1992) 7 CA4th 593.

Cross-Reference: On motions to strike priors, see Crim Law §§24.28–24.44.

§24.2 B. Motion to Preclude Impeachment With Prior Conviction

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

PLEASE TAKE NOTICE that on __[date]__ in Department __[number]__ at __[time]__, or as soon thereafter as the matter may be heard, the __[defendant/District Attorney]__ will move the Court for an order precluding impeachment of __[name of witness]__ with the following prior conviction: __[number serialim]__ on __[date of conviction]__ in _____ County for __[specify offense]__.

This motion will be made on the ground that the probative value on credibility of such prior conviction is outweighed by the risk of undue prejudice.

[Add if relevant]

This motion will be made on the further grounds that defendant's conviction for __[specify offense]__ may not be used for impeachment because it is not a crime of moral turpitude.

[Continue]

This motion will be based on the attached supporting memorandum, __[the attached declarations(s), the attached exhibit(s)]__, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _____

_____*[Signature of attorney]*_____

_____*[Typed name]*_____

_____*[Title if in public office]*_____

[The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB).]

SUPPORTING MEMORANDUM

[Select relevant arguments from examples, and include any additional relevant ones.]

THE COURT MUST PRECLUDE IMPEACHMENT OF THE DEFENDANT WITH A PRIOR CONVICTION IF ITS PROBATIVE VALUE ON CREDIBILITY IS OUTWEIGHED BY THE RISK OF UNDUE PREJUDICE

On motion by the defendant, the trial court must weigh the probative value of a prior conviction against its prejudicial impact and preclude its use to impeach the defendant if the risk of prejudice outweighs any probative value. (Evid C §352; *People v Collins* (1986) 42 C3d 378, 389; *People v Castro* (1985) 38 C3d 301, 306.)

Among the nonexclusive factors the trial court may consider in exercising its discretion to exclude evidence are whether the prior conviction is near or remote in time to the present offense, whether the prior conviction is for conduct similar to the present offense, and whether impeachment will affect the defendant's decision to testify.

(*People v Collins* (1986) 42 C3d 378, 391; *People v Beagle* (1972) 6 C3d 441, 453.) Other circumstances of the case that may be relevant may also be taken into account. *People v Collins, supra*.

__ [Tell what factors exist in your case that argue in favor of exclusion. Attach any documents as exhibits that support your assertions, and refer to them.] __

A PRIOR CONVICTION THAT DOES NOT INVOLVE MORAL TURPIDITY MAY NOT BE USED FOR IMPEACHMENT

A prior conviction is inadmissible as a matter of law if the least adjudicated elements of the conviction do not necessarily involve moral turpitude. (*People v Collins* (1986) 42 C3d 378, 389; *People v Castro* (1985) 38 C3d 301, 317.)

__ [Cite specific authority in support of argument that the offense in question is not one of moral turpitude. See list of authorities in Crim Law §24.46] __.

Date: _____

__ [Signature of attorney] __

__ [Typed name] __

__ [Title if in public office] __

Attorney for __ [name of defendant] __

Comment: Both defense and prosecution witnesses may be impeached with prior felony convictions (Cal Const art I, §28(f)(4); Evid C §788) or with prior misdemeanor conduct (*People v Wheeler* (1992) 4 C4th 284).

An opposition to the motion may be filed. Opposition is especially important when it is alleged that the prior conviction does not involve moral turpitude and there is case authority to the contrary or the issue has not been resolved.

NOTE► If the prior is similar to the present offense, the prosecution may wish to use it as a prior bad act under Evid C §1101 or may wish to sanitize it. See *People v Foreman* (1985) 174 CA3d 175.

Cross-Reference: For discussion of impeachment, see Crim Law §§24.45–24.51. Bad acts (“similar”) are discussed in Crim Law §§24.52–24.55.

Chaps 25-27
Dismissal; Case
Settlement

Chaps 25-27
Dismissal; Case
Settlement

6

Termination of Prosecution Without Judgment

I. OVERVIEW

A. Companion Volume §25.1

I. OVERVIEW

§25.1 A. Companion Volume

This manual is a companion volume to California Criminal Law Procedure and Practice (Cal CEB). This chapter is reserved.

Pleas and Case Settlement

I. OVERVIEW

- A. Checklist: Felony Guilty Plea §26.1
- B. Plea Form, With Explanations and Waiver of Rights—Felony (Judicial Council Form CR-101) §26.2

I. OVERVIEW

§26.1 A. Checklist: Felony Guilty Plea

NAME OF DEFENDANT _____

CASE NO. _____

- ___ 1. HAS THE DEFENDANT GIVEN HIS OR HER TRUE NAME?
- ___ 2. PROPER CHARGES (*include priors, enhancements, and no-probation allegations*)
- ___ 3. IF PRO PER, the right to an attorney, appointed if necessary
- ___ 4. TERMS OF PLEA BARGAIN (OMIT IF OPEN PLEA). SET FORTH AGREEMENT (*e.g., does defendant wish to plead guilty/nolo contendere to petty theft, a violation of Pen C §488, to receive the agreed-to/court-indicated sentence of six months in the county jail, and dismissal of the two grand theft counts, violations of Pen C §487*)
- ___ 5. REASONS FOR PLEA BARGAIN (*if charge is contained in Pen C §1192.7(a); see also Pen C §1192.6*)
- ___ 6. AGREEMENT CONDITIONAL ON:
 - ___ a. True name as stated
 - ___ b. Obeying all orders of court and appear as ordered if released pending sentencing (*Cruz waiver; People v Cruz (1988) 44 C3d 1247*)
 - ___ c. No violation of any laws other than minor traffic offenses

___ d. No prior convictions except as set forth

If any of the above is untrue or if conditions have been violated, the court can sentence to maximum penalty as set forth hereafter and plea cannot be withdrawn.

___ 7. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO JURY TRIAL/COURT TRIAL (*and preliminary hearing, if certified plea*)

___ 8. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO CONFRONTATION AND CROSS-EXAMINATION

___ 9. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO NOT INCRIMINATE ONESELF

___ 10. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO PRESENT EVIDENCE; SUBPOENA WITNESSES AT NO COST; TESTIFY ON OWN BEHALF

___ 11. MAXIMUM SENTENCE. (*If minimum sentences or parole eligibility for life crimes are discussed, be sure of accuracy. Do not discuss Board of Prison Terms guidelines or Matrices.*)

___ 12. IF IMMEDIATE INCARCERATION: State prison or county jail under Pen C §1170(h) for ___ years. Postrelease community supervision (PRCS) for dangerous offenders (maximum 3 years) thereafter for ___ years (*see below*).

___ 13. PAROLE OR PRCS TIME PERIOD:

___ a. Determinate sentence: 3 years, with certain exceptions under PRCS (Pen C §3000(b)(1); Pen C §3465(a)).

___ b. Life sentence, nonmurder: 5 years (Pen C §3000(b)(1)).

___ c. Life sentence, specified felony sex offenses (under Pen C §§667.61, 667.71): 10 years (Pen C §3000(b)(2)–(3)).

___ d. Specified sex offenses with victim under 14 years of age: 20 years and 6 months (Pen C §3000(b)(4)(A)).

___ e. Murder sentence, parole for life (Pen C §3000.1(a)(1)).

___ f. Life sentence: Additional 1-year maximum for parole violation plus 1 year for misconduct during revocation confinement (Pen C §3057).

- ☐ g. Parolee placed in custody: Up to 180 days in custody for the parole violation(s). Pen C §3455.
- ☐ 14. PROBATION OR SPLIT JAIL SENTENCE AFFORDING MANDATORY SUPERVISION (Pen C §1170(h)(5)(B)): (*No immediate state prison or full county jail term, i.e., imposition of sentence suspended; or ___ years state prison or county jail, execution of sentence suspended plus probation or mandatory supervision.*)
 - ☐ a. Ineligible.
 - ☐ b. Eligible for felony probation and suspended state prison sentence:
 - ☐ i. Possible 1-year county jail term per count
 - ☐ ii. Minimum jail term, if applicable (see, e.g., Health & S C §11550(a))
 - ☐ iii. Up to 5 years probation
 - ☐ iv. Conditions of probation (e.g., search, testing, restitution)
 - ☐ v. Up to maximum prison term if probation violated and revoked after PV hearing (*with parole consequences thereafter*)
 - ☐ c. Eligible for split sentence under Pen C §1170(h)(5)(A) (county jail term for part of full sentence and remainder of sentence suspended and defendant subject to mandatory supervision by county probation department).
- ☐ 15. FINES:
 - ☐ a. General (Pen C §672)
 - ☐ b. Restitution Fund fines (Pen C §1202.4; *People v Soria* (2010) 48 C4th 58, 63)
 - ☐ c. Drug fines (see, e.g., Health & S C §§11350, 11352.5, 11360, 11372)
- ☐ 16. OTHER CONSEQUENCES (*if applicable*):
 - ☐ a. Registration: narcotics (Health & S C §11590); sex offenses (Pen C §§290–294); arson (Pen C §457.1)
 - ☐ b. Payment of costs or fees such as drug education (Health & S C §11372.7)

- ___ c. AIDS testing (Pen C §1202.1)
- ___ d. Revocation or suspension of driver's license (Veh C §§13202, 13202.5, 13350–13352)
- ___ e. Possible commitment to Division of Juvenile Facilities (Welf & I C §§1731, 1731.5); if not accepted, possible state prison; note Welf & I C §707.2 cases
- ___ f. Serious felony (Pen C §1192.7(c))
- ___ g. Deportation, exclusion, or denial of naturalization (Pen C §1016.5)
- ___ h. Waiver of appellate rights (*all or particular ones, e.g., re previous unsuccessful motion to suppress*)
- ___ i. Waiver of custody credit
- ___ j. Effect on any current probation or PRCS
- ___ k. Ineligibility for current or prospective county jail incarceration (which has the advantages of obtaining 50 percent credits and would not require postrelease community supervision) for conviction of a serious (Pen C §1192.7(c)), violent (Pen C §667.5(c)), or registrable sex offense felony. Also ineligible are certain convictions under Pen C §186.11 and more than 60 other nonserious, nonviolent, and nonregistrable crimes deemed serious enough to be retained as state prison offenses. An enhancement may make the conviction a serious or violent felony as well. Pen C §3000.08(a)(3). (Note: An offender is ineligible for county jail if he or she is convicted under any offense statute that does not explicitly set forth a triad of sentences to be served "pursuant to subdivision (h) of Section 1170" or equivalent language.)

___ 17. ACKNOWLEDGMENTS

- ___ a. Free and voluntary
- ___ b. No promises or threats

- ___ c. Discussed elements, defenses, and consequences with attorney
- ___ d. Not under influence of alcohol, drugs, or medicine
- ___ e. Sentence imposed by different judge (*Arbuckle* waiver (*People v Arbuckle* (1978) 22 C3d 749) (*particularly in certified pleas*))
- ___ f. Sentencing judge may consider criminal history and entire factual background of case, including unfiled, dismissed, or stricken charges or allegations when granting probation, ordering restitution, or imposing sentence (*Harvey* waiver) (*People v Harvey* (1979) 25 C3d 754)
- ___ g. Effect of plea of nolo contendere
- ___ h. Pleading guilty because guilty in truth and in fact or other evidentiary basis
 - ___ i. Factual admission by defendant
 - ___ ii. Stipulation by counsel
 - ___ iii. Court review of evidence
 - ___ iv. *People v West* (1970) 3 C3d 595 (defendant taking advantage of plea bargain agreement)
- ___ 18. DOES COURT WISH TO INQUIRE ABOUT PLEA?
- ___ 19. TAKE PLEA/ADMISSIONS (PRIORS, ETC.)
- ___ 20. COUNSEL JOINS IN WAIVERS AND CONCURS IN PLEA
- ___ 21. PEOPLE JOIN IN WAIVERS AND CONCUR IN PLEA
- ___ 22. COURT MAKES FINDING OF FREE, VOLUNTARY, AND KNOWING WAIVER AND ACCEPTS PLEA

Comment: A felony is a crime punishable by death, by imprisonment in the state prison, or by imprisonment in a county jail under the provisions of Pen C §1170(h). Pen C §17(a).

Sentencing judges have the discretion to split local county jail sentences between actual custody and mandatory supervision by the local county probation officer. Pen C §1170(h)(5)(B). Realignment legislation also changed the custody credits formula so that most nondangerous offenders whose offense occurred after October 1, 2011, receive 50 percent credits. Pen C §4019(f), (h). Defendants convicted of a violent or serious felony who receive probation also are eligible for 50 percent credits.

Under §1170(h)(5)(B), offenders whose county jail sentences are split receive presentence credits under Pen C §4019 while in custody, but only actual time credits once they are being supervised. County probation officers will supervise most parolees.

Inmates released from county jail and not subject to a split sentence will not be supervised (*i.e.*, no postrelease supervision). Defendants convicted of felony offenses still punishable by state prison are subject to postrelease community supervision (PRCS) (as distinguished from mandatory supervision under a split county jail sentence), which replaces the concept of parole. See Pen C §§3450–3465. See also Pen C §3000.08(b). PRCS may be ordered for up to 3 years, with certain exceptions for early termination. Pen C §§3451, 3456(a)(1); Cal Rules of Ct 4.540(b)(1). The superior court is the parole authority for each county. Individuals released on PRCS are subject to county supervision and the Board of Parole Hearings has no jurisdiction over them. Pen C §§3451, 3456–3457.

Cross-Reference: For further discussion of PRCS, see §47.1. Guilty pleas are discussed in California Criminal Law Procedure and Practice, chap 26 (Cal CEB).

§26.2

B. Plea Form, With Explanations and Waiver of Rights—Felony (Judicial Council Form CR-101)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF		CR-101
STREET ADDRESS:		FOR COURT USE ONLY
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PEOPLE OF THE STATE OF CALIFORNIA v.		
Defendant:		
PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY		CASE NUMBER:

INSTRUCTIONS:

- (1) Fill out this form only if you want to plead guilty or no contest.
- (2) Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank.
- (3) On page 6, sign and date the form under "DEFENDANT'S STATEMENT."
- (4) Keep in mind that the court cannot give legal advice. If you have any questions about anything in this form, ask your attorney.

1. **CHARGES AND MAXIMUM TERM.** I want to plead guilty or no contest ("nolo contendere") to the charges and allegations listed below. I understand that the minimum and maximum penalties for the charges to which I am pleading guilty or no contest are listed below.

INITIALS

COUNT	CHARGES (SECTION & DESCRIPTION)	YEARS / MONTHS		PRIOR CONVICTIONS, ENHANCEMENTS, & SPECIAL ALLEGATIONS (SECTION & DESCRIPTION)	YEARS / MONTHS		TOTAL MAXIMUM TIME
		MINIMUM	MAXIMUM		MINIMUM	MAXIMUM	
AGGREGATE MAXIMUM TIME OF IMPRISONMENT							

2. **PLEA AGREEMENT.** I understand that I must tell the court on this form about any promises anyone has made to me about the sentence I will receive or the sentence recommendations that will be made to the court. My attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charges and admit the allegations listed above, the court will sentence me as follows:

- a. Check one: ☐ **State Prison** (or the Division of Juvenile Justice) ☐ **County Jail** for INITIALS
- (1) years and months or
- (2) ☐ **Not less than** years and months and/or not more than years and months.
- (3) ☐ **Other (specify):**
- b. **Probation** for years under conditions to be set by the court, including:
- ☐ days in the **county jail** or
- ☐ up to days in the **county jail.**

I understand that a violation of any of the conditions of probation, including failure to complete a drug education or treatment program, if ordered by the court, may cause the court to send me to **county jail or state prison** for up to the **"Aggregate Maximum Time of Imprisonment"** specified in item 1, which may include a period of mandatory supervision under Penal Code section 1170(h)(5)(B) if the court sends me to county jail.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CR-101 CASE NUMBER:
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- INITIALS**
2. c. **Split Sentence (1170(h)(5)(B)):** years and days in the county jail and years and days on mandatory supervision under conditions set by the court. I understand that if I violate any of the terms or conditions of mandatory supervision, I may be remanded into custody for the entire unserved portion of the sentence. ☐
- d. **Narcotics Addiction Confinement**
 I understand that if the court finds that I am addicted to narcotics or in immediate danger of becoming a narcotics addict, the court may send me to a narcotics detention, treatment, and rehabilitation facility for up to the amount of time I would otherwise have served in prison. ☐
- e. **Open Plea**
1. ☐ I understand the maximum and minimum sentences for the charges and allegations stated on page 1. No one has made any other promises to me about what sentence the court may order. ☐
 2. ☐ I understand that I am not eligible for probation. ☐
 3. ☐ I understand that I will not be granted probation unless the court finds at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation. ☐
- f. **Restitution, Statutory Fees, and Assessments**
 I understand that the court will order me to pay the following amounts (if an amount is not yet known, "TBD" for "to be determined" is entered next to the \$); I must prepare financial disclosure statements to assist the court in determining my ability to pay; and refusal or failure to prepare the required financial disclosure statements may be used against me at sentencing. ☐
1. ☐ \$ to the Victim Restitution Fund
 2. ☐ \$ restitution to actual victims
 3. ☐ \$ restitution to the State of California, Victims of Crime Fund
 4. ☐ \$ court operations assessment
 5. ☐ \$ court facilities assessment
 6. ☐ \$ base fine plus any applicable penalties, assessments, and surcharges
 7. ☐ \$ other (specify):
 8. ☐ \$ other (specify):
 9. ☐ An (additional) amount to be determined by the court at sentencing or such other hearing as the court may set.
- g. **Parole Revocation or Probation Revocation Fine**
 I understand that if I am sentenced to state prison, the court will impose a parole revocation fine, which will be collected only if my parole is later revoked. I also understand that if I am granted probation, the court will impose a probation revocation fine, which will be collected only if my probation is later revoked. ☐
- h. **Dismissal of Other Counts**
 I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing. ☐
- I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea. ☐
- i. **Other Terms (specify):** ☐

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CR-101 <small>CASE NUMBER:</small>
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3. CONSEQUENCES OF MY PLEA	INITIALS
a. No Contest ("Nolo Contendere") Plea I understand that a no contest plea is the same as pleading guilty and that if I plead no contest, I will be convicted and my no contest plea could be used against me in a civil case.	<input type="checkbox"/>
b. Parole and Postrelease Community Supervision I understand that if I am sentenced to state prison or a narcotics treatment facility	<input type="checkbox"/>
(1) I will be placed on parole or postrelease community supervision for up to _____ years after my release.	
(2) If I abscond or the court tolls my supervision, the total time of parole or postrelease community supervision can be extended.	
(3) If I violate any of the terms or conditions of my parole, I can be sentenced to county jail for up to 180 days for each violation, or returned to state prison for up to one year, up to a maximum of _____ years. If I violate any of the terms or conditions of postrelease community supervision, I can be sentenced to county jail for up to 180 days for each violation, for up to a maximum of 3 years.	
c. Effect of Conviction on Other Cases I understand that a conviction in this case may constitute a violation of any other current grant of parole, mandatory supervision, postrelease community supervision, or probation in any other case and that I may receive additional punishment as a result of that violation.	<input type="checkbox"/>
d. Registration I understand that I will be required to register with the local police agency or sheriff's department in the city or county in which I reside as	<input type="checkbox"/>
(1) <input type="checkbox"/> an arson offender	(4) <input type="checkbox"/> a sex offender (this registration is a lifelong requirement)
(2) <input type="checkbox"/> a gang member	(5) <input type="checkbox"/> other (specify):
(3) <input type="checkbox"/> a narcotics offender	
and that if I fail to register or to keep my registration current for any reason, new felony criminal charges may be filed against me.	
e. Prints and DNA Samples I understand that I must provide biological samples and prints for identification purposes including buccal (mouth) swab samples, right thumb prints, palm prints of each hand, and blood specimens or other biological samples required by law—and that failure to do so constitutes a new criminal offense.	<input type="checkbox"/>
f. Serious or Violent Felony	
(1) <input type="checkbox"/> I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my conviction in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.	<input type="checkbox"/>
(2) <input type="checkbox"/> I understand that if I am convicted of a violent felony, jail or prison conduct/work-time credit I may accrue will not exceed 15%.	
(3) <input type="checkbox"/> I understand that if I am admitting a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.	
(4) <input type="checkbox"/> I understand that if I am convicted of murder or a third felony conviction of certain offenses, I am ineligible to receive work-time credits. Count _____ is such an offense.	
g. Prior Prison Term or County Jail Sentence Under Penal Code Section 1170(h)(5) I understand that if I am sentenced to prison or county jail under Penal Code section 1170(h)(5), the penalty for any future felony conviction may be increased as a result of my incarceration in this case.	<input type="checkbox"/>
h. Driver's License and Vehicle Forfeiture I understand that my privilege to drive a motor vehicle may be revoked or suspended by the court or the California Department of Motor Vehicles, and my vehicle may be ordered forfeited if it was involved in the offense.	<input type="checkbox"/>

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3. i. Immigration Consequences I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, will result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty, and that the appropriate consulate may be informed of my conviction. The offenses that will result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense.		INITIALS <input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
j. Firearms I understand that federal and state laws prohibit a convicted felon from possessing firearms or ammunition for life.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
k. Other Consequences (specify):		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
4. RIGHT TO AN ATTORNEY I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me. I hereby give up my right to be represented by an attorney.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/> <input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
5. OTHER CONSTITUTIONAL RIGHTS I understand that I am entitled to each of the following rights as to the charges listed in item 1 (on page 1):		
a. Right to a Jury Trial I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent, and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were unanimously convinced beyond a reasonable doubt that I am guilty. I have a right, through my counsel, to participate in jury selection.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
b. Right to a Court Trial I understand that, as an alternative to a jury trial, if the prosecutor agrees, I may give up a jury trial and have a court trial in which the judge alone, without a jury, hears the evidence. I still could not be convicted unless, after hearing all of the evidence, the judge was convinced beyond a reasonable doubt that I am guilty.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
c. Right to Confront and Cross-Examine Witnesses I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court, they must testify under oath in my presence, and my attorney may question them.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
d. Right to Remain Silent and Not to Incriminate Myself I understand that I have the right to remain silent, and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself, and I cannot be forced to testify.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
e. Right to Produce Evidence and to Present a Defense I understand that I have a right to present evidence and to have the court issue subpoenas to bring to court all witnesses and evidence favorable to me, at no cost to me. I also have the right to testify on my own behalf.		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
6. BEFORE THE PLEA		
a. Discussion With My Attorney Before entering this plea, I have had a full opportunity to discuss the following with my attorney:		<input style="width: 40px; height: 40px; border: 1px solid black;" type="text"/>
(1) The facts of my case;		
(2) The elements of the charged offenses, prior convictions, enhancements, and special allegations;		
(3) Any defenses that I may have;		
(4) My constitutional and statutory rights and waiver of those rights;		
(5) The consequences of this plea, including the immigration consequences; and		
(6) Anything else I think is important to my case.		

PEOPLE OF THE STATE OF CALIFORNIA v.		CASE NUMBER:	CR-101
Defendant(s):			
6. b. Questions I have no further questions of the court or of my attorney with regard to my plea and admissions in this case, any of the rights, or anything else on this form.			INITIALS <div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
c. Stipulation to Commissioner I understand that I have the right to have a judge take my plea and sentence me. I give up this right and agree to have a commissioner, sitting as a temporary judge, take my plea and sentence me.			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
d. Medications or Controlled Substances I am not taking any medication that affects my ability to understand this form and the consequences of my plea, have not recently consumed any alcohol or drugs, and am not suffering from any medical condition, except for the following:			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
e. Court Approval of Plea Agreement I understand that the plea agreement in item 2 (on pages 1 and 2) is based on the facts before the court. I understand that if the court approves this plea agreement the approval of the court is not binding, and that the court may withdraw its approval of the plea agreement upon further consideration of the matter. I understand that if the court withdraws its approval of this plea agreement I will be allowed to withdraw my plea. (Pen. Code, § 1192.5.)			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
7. STATUTORY RIGHT TO A PRELIMINARY HEARING I understand that before I have a trial, the law gives me the right to a speedy preliminary hearing at which the prosecution would produce evidence and the court must find reasonable cause to believe I committed the crimes with which I have been charged. I understand that I have all of the above constitutional rights at the preliminary hearing, except for the right to a jury trial. I give up my right to a preliminary hearing and the constitutional rights listed in item 5 (on page 4).			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
8. WAIVER OF CONSTITUTIONAL RIGHTS I give up, for each of the charges and allegations listed in item 1 (on page 1), my right to a jury trial, my right to a court trial, my right to confront and cross-examine witnesses, my right to remain silent and not to incriminate myself, and my right to produce evidence and to present a defense, including my right to testify on my own behalf. I understand that I am, in fact, incriminating myself with my plea.			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
9. THE PLEA I freely and voluntarily plead <input type="checkbox"/> GUILTY <input type="checkbox"/> NO CONTEST to the charges listed in item 1 (on page 1) and admit the allegations listed in item 1 (on page 1), understanding that this plea and admission will lead to the penalties listed in item 2 (on pages 1 and 2).			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
a. I offer my plea of guilty or no contest freely and voluntarily and with full understanding of everything in this form. No one has made any threats, used any force against me, my family, or my loved ones, or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest.			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
b. I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses under the facts of the case. I offer to the court the following as the basis for my plea of guilty or no contest and any admissions:			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
(1) I understand that the court may consider the following as proof of the factual basis for my plea:			<div style="border: 1px solid black; width: 40px; height: 30px; margin: 0 auto;"></div>
(a) <input type="checkbox"/> Preliminary hearing transcript (b) <input type="checkbox"/> Police report (c) <input type="checkbox"/> Probation report (d) <input type="checkbox"/> Welfare investigator's declaration (e) <input type="checkbox"/> Court documents regarding any alleged prior offenses (f) <input type="checkbox"/> Other (specify): (g) <input type="checkbox"/> (Specify facts):			

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CR-101 CASE NUMBER
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9. b. (2) I am pleading guilty or no contest to take advantage of a plea agreement (my attorney will stipulate to a factual basis for the plea). (*People v. West* (1970) 3 Cal.3d 585.) INITIALS

10. **AFTER THE PLEA**

a. **Surrender**
 I understand that the court is allowing me to surrender at a later date to begin serving time in custody.

I agree that if I fail to appear on the date set for surrender or sentencing without a legal excuse, my plea will become an "open plea" to the court, I will not be allowed to withdraw my plea, and I may be sentenced up to the maximum allowed by law.

b. **Sentencing Court**
 I understand that I have the right to be sentenced by the same judge or commissioner who takes my plea. I give up that right and agree that any judge or commissioner may sentence me.

c. **Sentencing Date**
 I understand that I have the right to be sentenced within 20 court days. I give up that right and agree to be sentenced at a later date.

11. **MANDATORY WARNING**

I understand that if I am charged with violating Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or Vehicle Code sections 23152 or 23153, the following warning applies:

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving someone is killed, you can be charged with murder.

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above, and I give up each of them to enter my plea.

 DEFENDANT'S SIGNATURE _____
DATE

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge; any possible defenses to the charges; the effect of any prior convictions, enhancements, and special allegations; and the consequences of the plea.

I concur in the plea and admissions and join in the waiver of the defendant's constitutional and statutory rights, and I hereby stipulate that there is a factual basis for the plea and refer the court to the ☐ police report ☐ preliminary hearing transcript (People v. West (1970) 3 Cal.3d 585.)

☐ probation report ☐ other (specify): _____

 ATTORNEY'S SIGNATURE _____
DATE

CR-101 [Rev. May 25, 2016] **PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY** Page 6 of 7

(Criminal)

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Pretrial Diversion, Deferred Entry of Judgment, and Preplea Probation Report

I. OVERVIEW

A. Declaration of Ineligibility for Pretrial Diversion §27.1

I. OVERVIEW

§27.1 A. Declaration of Ineligibility for Pretrial Diversion

[The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4–1.10.]

**TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT,
THE DEFENDANT, AND DEFENSE COUNSEL:**

I, __[name of declarant]__, do hereby declare as follows:

I am a Deputy District Attorney of the County of _____. I am informed and believe that there is evidence from __[e.g., available police reports, interviews, personal observations]__ that the defendant, __[name]__, is ineligible for pretrial diversion under Penal Code section 1000.

Penal Code section 1000(a) in substance provides that a defendant is ineligible for pretrial diversion if any of the following apply to the defendant:

(1) The defendant has a prior conviction for an offense involving a controlled substance not listed in Penal Code section 1000 within five years prior to the date of the current charged offense.

(2) The present offense involves a crime of violence or threat of violence.

(3) There is evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than a violation of the offenses listed in Penal Code section 1000(a).

(4) The defendant has a felony conviction within five years of the present offense.

The specific facts within Penal Code section 1000(a)(1)–(4) providing that defendant is ineligible for pretrial diversion are as follows:
__[Specify]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

__[Name of District Attorney]__

District Attorney

__[Signature of declarant]__

__[Typed name]__

Deputy District Attorney

Comment: If the defendant is found ineligible for pretrial diversion, the prosecuting attorney must either file with the court a declaration in writing or state for the record the grounds on which the determination is based. This information must be made available to the defendant and defense counsel. Pen C §1000(b). Defense attorneys should ensure that the district attorney follows this mandate to preserve the record on appeal. See *People v Brackett* (1994) 25 CA4th 488, 496. The sole remedy of a defendant who is found ineligible for pretrial diversion is a postconviction appeal. Pen C §1000(b). See *People v Sturiale* (2000) 82 CA4th 1308, 1313. A defendant is not ineligible for pre-2018 deferred entry of judgment (DEJ) on the basis of evidence of a violation related to alcohol only, such as driving under the influence of alcohol. See *People v Orozco* (2012) 209 CA4th 726. This should also hold true for pretrial diversion, given that the legislature adopted the same language as in the former statutory scheme.

Cross-Reference: See California Criminal Law Procedure and Practice, chap 27 (Cal CEB).

Trial by Court or Jury

I. OVERVIEW

A. Companion Volume §28.1

I. OVERVIEW

§28.1 A. Companion Volume

This manual is a companion volume to California Criminal Law Procedure and Practice (Cal CEB). This chapter is reserved.

Jury Selection

Michael Begovich

I. OVERVIEW

- A. Jury Selection Chart **§29.1**
- B. Sample Jury Questionnaire **§29.2**
- C. Sample Jury Questionnaire: Capital Case **§29.2A**
- D. Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002) **§29.3**
- E. Sample Questions (No Questionnaire): Sexual Molestation of Boys **§29.4**
- F. Sample Questions (No Questionnaire): Rape of Woman by Former Boyfriend **§29.5**
- G. Sample Questions (No Questionnaire): Murder of Infirm Family Member **§29.6**
- H. Sample Questions (No Questionnaire): Murder of an Infant **§29.7**

I. OVERVIEW

§29.1

A. Jury Selection Chart

Juror No. 7	Juror No. 8	Juror No. 9	Juror No. 10	Juror No. 11	Juror No. 12
Juror No. 1	Juror No. 2	Juror No. 3	Juror No. 4	Juror No. 5	Juror No. 6

Juror name(s)	Sex	Age	Occupation	Marital Status	Children	Spouse's occupation	Personal knowledge of witnesses/victim?	Past jury duty?	Verdict	Hung jury?
Juror No. 1										
Juror No. 2										
Juror No. 3										
Juror No. 4										
Juror No. 5										
Juror No. 6										
Juror No. 7										
Juror No. 8										
Juror No. 9										

Juror name(s)	Sex	Age	Occupation	Marital Status	Children	Spouse's occupation	Personal knowledge of witnesses/victim?	Past jury duty?	Verdict	Hung jury?
Juror No. 10										
Juror No. 11										
Juror No. 12										

Juror name(s)	Seen publicly?	Where?	When?	Formed opinion based on publicity?	Overall feeling about juror	Challenged for cause?	Peremptory challenge by defense?	Wheeler challenge (by whom)?	Miscellaneous information
Juror No. 1									
Juror No. 2									
Juror No. 3									
Juror No. 4									

Juror name(s)	Seen public- ity?	Where?	When?	Formed opinion based on publicity?	Overall feeling about juror	Chal- lenged for cause?	Peremptory challenge by defense?	Wheeler challenge (by whom)?	Miscella- neous infor- mation
Juror No. 5									
Juror No. 6									
Juror No. 7									
Juror No. 8									
Juror No. 9									
Juror No. 10									
Juror No. 11									
Juror No. 12									

Comment: Check with the trial judge's clerk at the beginning of the trial to find out how that judge numbers the jury seats and modify the 12-space chart accordingly. Many trial judges use a "six-pack" approach whereby between 18 and 24 jurors are in the panel that gets questioned. After challenges are exercised, and if less than 12 jurors remain, the judge calls additional prospective jurors to fill the empty seats. Trial attorneys on both sides traditionally use a chart like the one printed above during jury selection and voir dire to take notes on the personalities, preferences, and any special concerns with respect to prospective jury members.

Most felony criminal trials in California last 3 to 5 court days. Voir dire for defense counsel is often limited to no more than 30 minutes per panel by the trial judge. Consequently, questions need to be focused and case-specific to succeed in persuading those potential jurors who are predisposed not to disclose to, in fact, disclose. Body language is considered in the calculus of whether to exercise a peremptory or cause challenge on a particular juror. If defense counsel writes feverishly instead of maintaining eye contact when listening to a response, then body language is missed. Accordingly, the author uses the jury selection chart given to counsel by the court clerk, uses the smallest Post-it Notes™, and only writes a few things such as "+", "-", or "?". To sum up the author's experience, the most effective voir dire is achieved by writing less and watching more.

However, if counsel wishes to utilize a more formalized chart, then the chart provided above allows trial counsel to integrate key responses elicited in the voir dire process, assists in prioritizing which jurors to excuse and in what order, and allows counsel to list key facts that would support a *Batson-Wheeler* motion under the "Miscellaneous information" heading. While the type of chart is determined by counsel's preference, the key point is to avoid keeping one's head buried in note-taking instead of intently watching the prospective jurors. Active listening must be employed to truly "understand" the jurors' responses. Voir dire is not the time for trial counsel to give a lecture, as the best voir dire occurs when the prospective jurors do most of the talking.

In that regard, counsel should be particularly careful to make notes of the specific reasons he or she plans to challenge any juror. While an attorney need not initially articulate the reasons for dismissing a juror with a peremptory challenge, both prosecutors and defense attorneys may be subject to *Batson-Wheeler* challenges when jurors of certain protected classes are dismissed. See *Snyder v Louisiana* (2008) 552 US 472, 128 S Ct 1203; *People v Wheeler* (1978) 22 C3d 258, 276, disapproved on other grounds in *Johnson v California* (2005) 545 US 162, 173, 125 S Ct 2410; *Batson v*

Kentucky (1986) 476 US 79, 84, 106 S Ct 1712; *Georgia v McCollum* (1992) 505 US 42, 59, 112 S Ct 2348; *People v Willis* (2002) 27 C4th 811; see CCP §231.5 (peremptory challenges may not be used to remove juror under presumption that he or she is biased “merely because of a characteristic listed or defined in Government Code §11135 or similar grounds”). After a *Batson-Wheeler* motion is made in court, the trial judge usually calls on the attorney who dismissed the challenged juror to articulate his or her “legitimate, non-suspect” reasons for the peremptory challenge. See *People v Gray* (2001) 87 CA4th 781, 788. Keeping detailed notes of the specific race-neutral, gender-neutral, and other neutral reasons for challenging a juror (e.g., “juror was not paying attention,” “juror was wearing political t-shirt,” “juror expressed mistrust of police officers”) will enable counsel to articulate those neutral reasons quickly and specifically after a *Batson-Wheeler* challenge, which will make it easier to defeat the challenge in court and better preserve the record for appeal.

Assuming a defendant exhausts all state court appellate remedies, habeas litigation in federal court challenging an erroneous state court *Batson-Wheeler* finding may result in the court reviewing more material from the record compared with what a state appellate court might review. Trial counsel must ensure that a detailed, specific record is made that is germane to prosecutorial bias. Recently, the Ninth Circuit in *McDaniels v Kirkland* (2015) 813 F3d 770, 778, held that the use of a comprehensive juror analysis—above and beyond what the state court relied on—is important to determine whether the state court’s *Batson* decision was improper. Indeed, the entire state-court record should be considered, including materials presented to the state trial judge but not the state appellate court. Thus, remand was ordered to determine whether there was a *Batson* violation with respect to the underlying murder conviction.

Cross-Reference: For discussion of jury selection, including the attorney’s right to question jurors directly, jury questionnaires, challenges for cause and peremptory challenges, and *Batson-Wheeler* motions, see California Criminal Law Procedure and Practice §§29.7–29.37 (Cal CEB).

§29.2 B. Sample Jury Questionnaire

INSTRUCTIONS FOR JURY QUESTIONNAIRE

This questionnaire is designed to shorten the time needed to obtain information about your background as it relates to your possible service as a fair and impartial juror in this case. We use the questionnaire to avoid putting each of these questions to each prospective juror in open court, which takes a great deal longer.

The California courts, in accordance with constitutional principles, have held that the answers contained in this questionnaire are part of the public record, and as such are not confidential. That means that your completed questionnaire must be released to representatives of the media if they so request. This court would have no choice but to comply with such a request if made.

Therefore, to best protect your privacy, while upholding the mandated principles of our constitution, the Court advises the following:

If you wish to keep any of the answers to any of the questions confidential for personal privacy reasons, please so indicate in the space provided for the particular answer. The question can then be answered orally, in the privacy of the judge's chambers, in the presence of the attorneys. If the Court then determines that your request for privacy is proper, your answer to the question will be sealed and not released to the media or repeated in open court.

During questioning by the Court, you will be given an opportunity to explain your responses if necessary. In any instance where you feel your answers may invade your right to privacy or might be embarrassing to you, indicate this to the court. The Court will then give you an opportunity to speak to the Court and counsel outside the hearing of the other jurors.

Please respond to each question as fully and completely as possible, and print your name at the top of each page. Please use dark ink. If you require additional space for your response or wish to make further comments regarding any of your answers, please use the explanation sheet attached to the back of your questionnaire. If you do not understand a question, please place a large question mark (?) in the space for an answer.

Your complete candor is necessary so that both the prosecution and defense will have a meaningful opportunity to select a fair and impartial jury. Your cooperation is of vital importance.

Because this questionnaire is part of the jury selection process, the questions are to be answered under your oath as a prospective juror to tell the truth. You are instructed not to discuss this case or questionnaire with anyone, including fellow jurors.

Please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers. They assist all parties in obtaining a fair and impartial jury.

JURY QUESTIONNAIRE

PLEASE PRINT LEGIBLY AND USE A DARK INK PEN

BACKGROUND AND EMPLOYMENT

NAME _____

AREA OF RESIDENCE _____

1. AGE _____

2. SEX _____

3. PLACE OF BIRTH _____

4. EMPLOYMENT OUTSIDE THE HOME? YES ____ NO ____

1994-2000: 2001-2007: 2008-2014: 2015-2020: 2021-2022:

7/30/2015 10:56:00 AM

RETIRED? YES ____ NO ____

IF EMPLOYED OUTSIDE THE HOME: _____

EMPLOYER _____

JOB TITLE _____

DESCRIPTION OF DUTIES _____

HOW LONG WITH PRESENT EMPLOYER? _____

ALL JURORS:

IF YOU HAD A PREVIOUS JOB, HOW LONG DID YOU WORK AT
THAT JOB?

PREVIOUS JOB/OCCUPATION: _____

HAVE YOU EVER BEEN IN BUSINESS FOR YOURSELF? YES ____
NO ____

IF "YES," PLEASE BRIEFLY EXPLAIN: _____

HAVE YOU EVER HAD ANY SUPERVISORY EXPERIENCE AT
WORK? YES ____ NO ____

IF "YES," PLEASE BRIEFLY DESCRIBE: _____

5. HOW LONG HAVE YOU LIVED AT YOUR CURRENT ADDRESS?

DO YOU OWN? _____

RENT? _____

LIVE WITH FAMILY? _____

OTHER? _____

HOW LONG DID YOU LIVE AT THE PLACE YOU LIVED JUST
BEFORE YOU MOVED TO YOUR PRESENT HOME? _____

6. MARITAL STATUS: MARRIED SINGLE DIVORCED WIDOWED
DOMESTIC PARTNER

IF MARRIED OR PARTNERED, IS YOUR SPOUSE OR PARTNER
EMPLOYED? YES ____ NO ____

IF YES, WHERE AND WHAT TYPE OF EMPLOYMENT? _____

IF DIVORCED OR WIDOWED, WHAT WAS YOUR SPOUSE'S
OCCUPATION? _____

7. DO YOU HAVE CHILDREN? YES ____ NO ____

HOW MANY? _____ AGES: _____

DO YOU HAVE GRANDCHILDREN? YES ___ NO ___

HOW MANY? _____ AGES: _____

IF APPLICABLE, WHAT ARE THEIR JOBS OR OCCUPATIONS?

8. ARE THERE ANY OTHER ADULTS RESIDING IN YOUR HOME?

YES ___ NO ___

IF YES, WHAT IS THEIR RELATIONSHIP TO YOU? _____

WHAT ARE THEIR JOBS OR OCCUPATIONS? _____

EDUCATION

9. ELEMENTARY SCHOOL? YES ___ NO ___ JUNIOR HIGH
SCHOOL? YES ___ NO ___ HIGH SCHOOL? YES ___ NO
___ COLLEGE? YES ___ NO ___ POST-GRADUATE? YES ___ NO

PLEASE LIST ALL DEGREES, CERTIFICATES, LICENSES, AND
MAJOR AREAS OF STUDY, TELLING WHEN AND FROM WHAT
INSTITUTION. _____

10. HAVE YOU EVER STUDIED MEDICINE, NURSING, PHARMACOL-
OGY OR ANY RELATED SUBJECT? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

11. HAVE YOU EVER STUDIED OR RECEIVED TRAINING IN PSY-
CHOLOGY, PSYCHIATRY, SOCIAL WORK, SOCIOLOGY, OR
COUNSELING? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

12. HAVE YOU RECEIVED ANY TRAINING IN LAW, LAW ENFORCE-
MENT, OR CRIMINOLOGY? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

13. ARE YOU CURRENTLY ATTENDING SCHOOL? YES ___ NO ___

IF YES, STATE YOUR AREA OF STUDY: _____

14. DO YOU HAVE FURTHER EDUCATIONAL PLANS FOR THE
FUTURE? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

MILITARY

15. WERE YOU IN THE MILITARY? YES ____ NO ____

IF YES, ANSWER THE FOLLOWING:

BRANCH OF SERVICE: _____

DATES OF SERVICE: _____

RATE OR RANK: _____

WHERE WERE YOU STATIONED? _____

CHARACTER OF DISCHARGE (E.G., HONORABLE, GENERAL): _____

REASON FOR DISCHARGE: _____

WHAT WERE YOUR DUTIES? _____

WERE YOU EVER INVOLVED IN ANY WAY WITH MILITARY LAW ENFORCEMENT, NONJUDICIAL PUNISHMENT, COURTS MARTIAL, OR ADMINISTRATIVE BOARDS OR HEARINGS? YES ____ NO ____

WERE YOU EVER IN COMBAT? YES ____ NO ____

IF YES, WHEN AND WHERE WERE YOU IN COMBAT? _____

HAVE YOU EVER BEEN IN A COMBAT AREA? YES ____ NO ____

HAVE YOU BEEN IN THE RESERVES OR NATIONAL GUARD? YES ____ NO ____

FIREARMS

16. DO YOU OR DOES ANYONE ELSE IN YOUR HOME OWN A GUN? YES ____ NO ____

IF YES: WHO? _____

WHAT KIND AND HOW MANY? _____

REASON FOR OWNING GUN? _____

PERSONAL

17. WHAT ARE YOUR FAVORITE HOBBIES AND/OR PASTIMES? _____

18. TO WHAT CLUBS OR ORGANIZATIONS DO YOU BELONG? _____

HAVE YOU EVER HELD A LEADERSHIP POSITION IN THESE ORGANIZATIONS? YES ____ NO ____

IF YES, PLEASE DESCRIBE: _____

19. ARE YOU REGISTERED TO VOTE? YES ___ NO ___

DID YOU VOTE IN THE LAST ELECTION? YES ___ NO ___

20. WHAT KIND OF BOOKS OR MAGAZINES DO YOU READ? _____

21. WHAT TELEVISION AND RADIO PROGRAMS DO YOU VIEW OR LISTEN TO ON A REGULAR BASIS?

22. DO YOU HAVE A HOME, LAPTOP, OR TABLET COMPUTER? YES ___ NO ___

DO YOU HAVE A SMARTPHONE? YES ___ NO ___

DO YOU FREQUENTLY USE A DIGITAL DEVICE TO CONDUCT ANY TYPE OF RESEARCH? YES ___ NO ___

IF YES, PLEASE EXPLAIN _____

23. DESCRIBE WHAT BLOGS YOU FOLLOW. IF YOU AUTHOR OR PARTICIPATE IN A BLOG, WHAT IS THE CONTENT OF YOUR BLOG?

WHAT ARE YOUR FAVORITE WEBSITES AND WHY? _____

DO YOU PARTICIPATE WITH GOOGLE+, FACEBOOK, TWITTER, SNAPCHAT, LINKED-IN, YOUTUBE, INSTAGRAM, AND/OR OTHER "SOCIAL NETWORKING" WEBSITES? YES ___ NO ___

IF YES, PLEASE LIST EACH SITE YOU GO TO, HOW OFTEN EACH DAY YOU ARE ON THE SITE, AND DESCRIBE YOUR PRIMARY PURPOSE FOR USE OF THAT SITE.

DO YOU READ "BLOGS"? IF SO, WHICH ONES AND WHY?

DO YOU WRITE A BLOG OR BLOGS? YES ___ NO ___

IF YES, PROVIDE THE IP ADDRESS(ES) OF YOUR BLOG(S) AND DESCRIBE THE LENGTH AND CONTENT OF YOUR BLOG(S) AND HOW OFTEN YOU WRITE FOR EACH BLOG.